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No. 30

In the Supreme Court of the United States

OCTOBER TERM, 1941

DANIEL D. GLASSER,

Petitioner,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF FOR THE PETITIONER.

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The brief of the United States, failing in many instances to meet the issues, has by way of avoidance raised new questions. While many of the contentions appear to be so unfounded in law or on the record as to be frivolous, the apparent earnestness with which they are advanced and the Government's prolix and disjointed attempt to argue the sufficiency of the evidence require this reply. For the convenience of the Court, in view of the many points involved, there is included in the Index a detailed Concordance of the various points mentioned in the three briefs.

I.

The Alleged Indictment Was Not In Fact Returned In Open Court By Any Grand Jury.

(Pet. Br. 12-20; Gov't Br. 32-37.)

That the alleged indictment was not in fact returned in open court by any grand jury has been the contention of the petitioner from the beginning. The Government's statement (Gov't Br. 32) that "no contention seems to be made that the indictment was not in fact returned in open court" clearly disregards:

(a) The motion to quash (R. 142):

> "* * * the said indictment was not properly returned in open court * * *."

(b) Assignment of Errors No. 1(b) (R. 115):

> "That the indictment was not properly returned in open court."

(c) The petition for certiorari (p. 16):

> "The petitioner, with the other defendants, by a motion to quash, supported by affidavit, raised the point that the alleged indictment had not been properly returned in open court * * *."

(d) The reply brief on petition for certiorari (pp. 2-3):

> "* * * the record does clearly show that petitioner contended below as he does here that the purported indictment was not returned by the grand jury (R. 142, 149)."

(e) The re-emphasis in the petitioner's main brief (p. 12):

> "The petitioner, with the other defendants, filed a motion to quash the indictment because, among other

> things, 'the said indictment was not properly returned in open court'."

Because petitioner was not in court on September 29th and so cannot know what took place, and because the record fails to show return of the indictment as required by law for his protection against unfounded accusations, it is, of course, his position that none was returned against him.

The Government recognizes the correctness of the rule stated in the Federal courts and for which petitioner contends (Gov't Br. 33):

> It seems to be well settled that the record must show that the indictment was returned into court by the grand jury *either* by a minute entry to that effect *or by indorsement of the fact upon the indictment itself.*

But the Government contends that indorsements by the clerk and the foreman are sufficient (Gov't Br. 33).

In the case of *Ledbetter* v. *United States,* 108 Fed. 52, 53 (C. C. A. 5), the indictment bore indorsements identical in wording with those which obtain here:

> "A true bill. James W. Powell, Foreman of the Grand Jury.
>
> "Filed in open court this 21st day of Nov., 1899. J. W. Dimmick, Clerk."

The Court in that case, as more fully appears from the petition for certiorari (p. 18), said (108 Fed. 52, 55):

> Neither this minute entry, nor the file mark, nor the two together, was sufficient to identify the indictment as properly returned into the district court *by the grand jury,* and this seems to be a plain error on the face of the record. (Italics supplied.)

The Federal rule, therefore, is contrary to the Government's position here.[1]

That the indorsements by the clerk and the foreman of the jury were recognized to be inadequate is shown by the effort to cure the defect by the surreptitious addition to the motion slip (see Main Brief, p. 17). For the information of this Court, a photolithograph of this motion slip was printed at page 17 of petitioner's reply brief on petition for certiorari. This shows clearly the violence of the Government's presumption that the addition to this slip "was made by Judge Wilkerson". Casual examination indicates his initials were affixed on the date of the order discharging the Grand Jury, which was long before the addition was made.

The Government's argument (Gov't Br. 35) indicates a complete misapprehension of the nature of a *nunc pro tunc* order. A formal order signed by the court is recognized as necessary, and is required for the express purpose of precluding, in such vital matters as this, the very conjectural conclusions which the Government here makes (Gov't Br. 36):

> This entry was, *we think*, ordered by Judge Wilkerson to be made so that the record might more specifically show that the indictment was returned in open court by the grand jury. (Emphasis supplied.)

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[1] It may be conceded that certain of the State courts have, in conflict with the *Ledbetter* and *Renigar* cases, held indorsement by the foreman and by the clerk adequate to satisfy the requirement. However, *State* v. *Crilly*, 69 Kan. 802, 77 P. 701, and *Westcott* v. *State*, 31 Fla. 458, cited by the Government, are not in point since in each case the clerk's indorsement showed the return by the grand jury. Moreover, as against the State cases cited by the Government, there should be contrasted those which recognize that return of the indictment by the grand jury is such a vital step that it must definitely appear from the record. *Thornell* v. *People*, 11 Col. 305; *Sattler* v. *People*, 59 Ill. 68; *Aylesworth* v. *Illinois*, 65 Ill. 301; *Heacock* v. *State*, 42 Ind. 393, 394; *Long* v. *State*, 56 Ind. 133; *Chappell* v. *State*, 8 Yerger (Tenn.), 166; *Henry* v. *State*, 4 Humph. (23 Tenn.), 270, 272.

The very purpose of the rule requiring a *nunc pro tunc* order for entries made after the term is designed to prevent the Government or any other person or court from "thinking" or "guessing" away the rights of litigants. The return of an indictment is not a technicality; it is equally as important as the return of a verdict. Furthermore, the Government's assumption that Judge Wilkerson had acted to amplify the motion slip also assumes that he would order such an ambiguous and non-conclusive entry—"The Grand Jury return 4 Indictments in open Court". This further demonstrates the invalidity of the Government's position.

The Government's own citations (Gov't Br. 36) set out the form of a *nunc pro tunc* order, *Slade* v. *United States*, 85 F. (2d) 786, 787, and recognize the necessity that where a *nunc pro tunc* order is made after the term "the party opposing correction of the record should have the usual rights of inspection and cross-examination and proof." *Downey* v. *United States*, 91 F. (2d) 223, 233. Petitioner has never questioned the power of a court during the same term to correct its records without a *nunc pro tunc* order or notice to defendants. The Government cites *United States* v. *Bishop*, 47 F. (2d) 95, 96, to show that notice before entry of a *nunc pro tunc* order is unnecessary, but the case is clearly not in point since it specifically states:

> "We have, therefore, no question of correcting the record after the term."

Indeed, *Cornette* v. *Baltimore & Ohio R. Co.*, 195 Fed. 59, 61, also cited by the Government, quotes with approval the rule which permits correction by *nunc pro tunc* order "upon notice to the parties in interest."

The Government concludes (Gov't Br. 37) that:

> "Even if it were assumed that this record showing was made without authority, as petitioners contend,

it nevertheless reflects the actual facts relating to the return."

We refrain from comment which might dim the luster of this bland assumption—particularly since the actual fact of the return of any indictment, and the adequacy and authenticity of the required record, are the very questions to be determined.

The statute invoked by the United States respecting matters of form which do "not tend to the prejudice of the defendant" (18 U. S. C., sec. 556) has no application here, because this is a matter not of form but of substance; by its very terms it applies only to indictments "found and presented by a grand jury," and to say the least it tends to the prejudice of the defendant. The defect here is no matter of mere form. Since the record fails to show "indictment of a grand jury" within the meaning of the Fifth Amendment, the trial court was without jurisdiction to try petitioner and the sentence is necessarily void. *Ex Parte Wilson*, 114 U. S. 417, 429; *Ex Parte Bain*, 121 U. S. 1, 13; *Johnson* v. *Zerbst*, 304 U. S. 458, 463; *Renigar* v. *United States*, 172 Fed. 646, 648.

II.

The Jury Commissioner and the Clerk of the District Court Violated the Laws of the State of Illinois and of the United States in the Selection of the Grand Jury.

(Pet. Br. 20-23; Gov't Br. 38-43.)

The arbitrary exclusion of the names of women from the box from which the list of grand jurors was drawn was an obvious violation of law. In answer, the Government merely attempts to minimize the error on the mixed ground that "so brief a period elapsed between July 1, 1939, the effective date of the State law rendering women

eligible as jurors * * * and August 25, 1939, the date the grand jury was summoned, that it was not error to omit the names of women from the Federal jury list where it was not shown that women's names had yet appeared on the State jury lists" (Gov't Br. 40, note 4). But in substance this argument amounts merely to contention that, until occasion arose for application of the law in the State courts, the law admittedly in effect was nevertheless to be disregarded in the selection of grand jurors in the Federal courts in Illinois.

There is presented a clear breach of mandatory law.— Petitioner has no quarrel with the Government's contention that technical irregularities, in the absence of a showing of prejudice, do not require that an indictment be quashed. Neither does he question the correctness, on their particular facts, of the *Agnew* case or the Government's citations following it (Gov't Br. 41-42). They are inapposite. As pointed out in petitioner's main brief (p. 23), the wilful failure of the clerk and jury commissioner to obey the positive requirements of a mandatory provision of the law is no mere irregularity.

Title 28, U. S. C., provides in pertinent substance:

> Sec. 411. Jurors to serve in the courts of the United States, in each State respectively, shall have the same qualifications * * * as jurors of the highest court of law in such State may have and be entitled to at the time when such jurors for service in the courts of the United State are summoned.
> Sec. 412. All such jurors, grand and petit, including those summoned during the session of the court, shall be publicly drawn from a box containing, at the time of each drawing, the names of not less than three hundred persons, possessing the qualifications prescribed in the section last preceding.

The statutes, therefore, are clear and specific.

The distinction between mere irregularity and violation of the law was recognized in *United States* v. *Ambrose*, 3 Fed. 283, per Swayne, J. (p. 286):

> I think no sound view of the subject will warrant any other conclusion than that that provision[2] is mandatory, and I think it is the duty of every court of the United States to regard it and carry it out. * * * That statute * * * must be obeyed as to the substantial provisions in summoning the grand jurors, as well as the petit jurors. * * * The *venire* must be issued in conformity to its requirements. * * * The jurors drawn, whose names are put into the box, and who are selected and summoned to serve on the grand jury, must have the qualifications prescribed by law. But, on the other hand, * * * any slight irregularity, such as may arise in any case in spite of the greatest care and caution * * * is not fatal to the indictment.

This same distinction was recognized in *United States* v. *Benson*, 31 Fed. 896 (where it appeared that a grand juror was not named as taxpayer on the assessment roll). There the court (through Field, J.) stated the rule as follows (p. 901):

> Omissions which do not impair any substantial right or prejudice the defense of the accused must be disregarded, *unless otherwise required by positive statute*. (Emphasis supplied.)

And again in *United States* v. *Mitchell*, 136 Fed. 896, 904, the court said:

> "Before the court can consider any objections made, it must at least appear, not from the belief expressed, but from the facts stated, that the defendant has suf-

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[2] The reference was to Act of January 30, 1879, c. 552, § 2, 21 Stat. 43, repealed by § 276 of the Judicial Code, Act of March 3, 1911, c. 231, 36 Stat. 1164, which replaced it. 28 U. S. C. sec. 412.

> fered some impairment of a substantial right or some prejudice, *or that the things complained of violate the requirements of a positive statute.*" (Emphasis supplied.)

And in *United States* v. *Chaires*, 40 Fed. 820, 821, the court also recognized that the statutory requirement—that all jurors shall be publicly drawn from a box containing at the time of each drawing the names of persons possessing the qualifications prescribed by the statute—is mandatory.

Moreover, where it appears that no attempt is made to comply with the law, the Illinois decisions hold that a motion to quash must be sustained even though no prejudice is shown. *People* v. *Mack*, 367 Ill. 481, 487, 488; *People* v. *Clempitt*, 362 Ill. 534; *People* v. *Schraeberg*, 347 Ill. 392; *People* v. *Fudge*, 342 Ill. 574; *People* v. *Mankus*, 292 Ill. 435. There is thus, contrary to the Government's statement (Gov't Br. 43, n. 7), no conflict between the Federal and Illinois decisions.

Exclusion of women from the grand jury box in this case was the result of deliberate and arbitrary action on the part of the clerk and the jury commissioner. The motion to quash alleged that the clerk and jury commissioner excluded from the box containing names of persons selected to serve as grand jurors all persons of the female sex because of their sex and included only persons of the male sex, illegally, improperly and in violation of the laws of the United States and of Illinois (R. 141-142). The affidavit in support alleged that, deliberately "upon the advice of the United States Attorney by his representative Martin Ward" (R. 148), the prosecutor herein, they wilfully omitted from the box qualified female electors in violation of the Illinois law and refused to recognize the law for the pretended reasons that the amendatory act was not mandatory and "the said Clerk and Commissioner were not

required to include qualified female electors in said list" (R. 148). The prosecutor's motion to strike admitted all allegations of the motion to quash (R. 150).

It thus appears that there was here no mere irregularity, but a deliberate and intentional non-compliance. The clerk and commissioner simply set their own measure of qualifications of grand jurors in a wilful disregard of the mandatory requirement of the statutes that members of each sex be included in the jury list.

It is plain that neither of the two cases cited by the United States dealing with exclusion of women from the jury is controlling here. In *Wuichet* v. *United States,* 8 F. (2d) 561, 563, there was no showing of arbitrary discrimination; nor does it appear that the Ohio law qualifying women as jurors made inclusion of the names of members of each sex mandatory. The decision in *United States* v. *Ballard,* 35 F. Supp. 105, 106 (S. D. Calif.), clearly supports petitioner since it recognizes that, *if* the State law makes the inclusion in the list of both sexes mandatory, the practice of exclusion is illegal and must be condemned—although there the California Supreme Court in *People* v. *Parman,* 14 Cal. 2d 17, 92 P. 2d 387, 388, had held that the provisions of the code as to inclusion of women on juries "are directory and not mandatory."

Here the Illinois Revised Statutes, 1939, c. 78, specifically provide in both section 1 and section 25 for the inclusion in the jury list of members of each sex (see Pet. Br. 21, note 11) And the Government admits that in *People* v. *Traeger,* 372 Ill. 11, the Supreme Court of Illinois held that, in making the discretionary annual revision provided by the statute, it is mandatory that the commissioners include the names of eligible women (Gov't Br. 40, note 3). It appears, therefore, that the authorities cited by the United States in no way militate against petitioners contention that when the officers of the court arbitrarily and wilfully

attempt to violate and nullify the positive requirements of the State statute as to qualifications adopted by 28 U. S. C., secs. 411 and 412, the indictments of a grand jury so drawn must be quashed even though no other prejudice to the defendant is shown than that inherent in the breaching of a law enacted for his protection.

III.

The Trial Jury was Unfairly and Prejudicially Constituted by the Illegal Delegation of Their Duties by the Clerk and the Jury Commissioner in Violation of the Petitioner's Right to Trial by an Impartial Jury.

(Pet. Br. 23-27; Gov't Br. 50-56).

Preservation of the error.—One of the Government's answers to petitioner's contention that he was deprived of his right to an impartial trial through the manipulation of the trial jury is its sheer speculation and blithe "assumption" (Gov't Br. 52) that evidence or argument may have been adduced by the Government which caused the trial court to find the allegations in the two affidavits without merit and contrary to fact. The denial of the motion must indeed be accepted as an indication that the trial court found them without merit, but the suggestion that the court may have found them contrary to fact is based on two unsupportable premises:

(1) The first of these is that the Government may have introduced evidence rebutting the showing of the affidavit. Of this it may be said that petitioner, contrary to the Government's assertion (Gov't Br. 52 note) does claim that the truth of the allegations was not contested at the hearing and that, after presentation of the affidavits to the court and without argument, the motion was summarily overruled. The bill of exceptions contains the following entries (R. 1046, 1059):

> On April 22nd, 1940 arguments of counsel on said motions were heard by the court, and taken under advisement, until April 23, 1940.
>
> • • • • • • •
>
> Thereupon the defendant, Daniel D. Glasser, filed his three affidavits in support of his motion for a new trial, and in arrest of judgment, which affidavits are in words and figures as follows
>
> • • • • • • •
>
> Thereupon on to-wit, April 23, 1940, the court overruled and denied the motions of the defendants for a new trial.

The bill of exceptions thus clearly indicates that, subsequent to the filing of the affidavits, there was no hearing at which evidence was introduced, or even that argument was had thereon.

Moreover, the certificate to the bill of exceptions stating that it contains "all evidence adduced at the said trial" must be read as including any evidence which was given on the motion for new trial, particularly since the judge certified (R. 1069) that the Bill of Exceptions—

> contains all the material facts, matters, things, proceedings, rulings, and exceptions thereto occurring upon the trial of said cause, and not heretofore a part of the record herein, including all evidence adduced at the said trial.

It is obvious that—since the motion for new trial, and affidavits, exhibits, minutes, and orders on the motion for new trial were all included in the bill of exceptions—the court in the certificate used the word "trial" as embracing all proceedings up to and including judgment. *Century Indemnity Co.* v *Nelson*, 303 U. S. 213, 217. In addition, petitioner clearly assigned the denial of a new trial as error

(R. 128), and the certificate is that the bill of exceptions contains "all the material facts, matters, things, proceedings, rulings, and exceptions thereto" (R. 1069).

Giving to the bill of exceptions its required absolute verity, it can only be concluded that no evidence was adduced by the Government on the motion for new trial and that no other objection to the allegations of the affidavit was made.

(2) The second suggestion here (Gov't Br. 51-52) is that the Government may have advanced in the trial court some argument to counter the affidavit filed by Glasser (R. 1049-1057). If such an argument was made as the Government contends and petitioner denies, there is nothing which now prevents the Government from stating what that argument was or adopting it here with all of its original force and vigor.

On the merits.—As to the merits of the contention of petitioner little need be added. Plainly absurd is the suggestion of the Government (Gov't Br. 53-54) that a mere technical irregularity is shown by the surrender of the function of selection of one-half of the names for the jury box to a specially coached group within the League of Women Voters. The contention that upon such a showing neither injury nor prejudice can be inferred finds no support in the facts of the cases cited by the Government. Neither does petitioner question the correctness, on their particular facts, of the cases cited by the Government to the effect that the clerk and jury commissioner are permitted to exercise a reasonable degree of selectivity in determining the names placed in the box. They have no application here, for, among other things, the clerk and jury commissioner completely surrendered their functions.

The rule applicable on the facts here presented is stated in the numerous citations contained in petitioner's main brief (pp. 25-26); and it is significant that the Government

has declined to so much as cite these cases, much less discuss or attempt to distinguish them. For example, in *Dunn* v. *United States*, 238 Fed. 508 (C. C. A. 5) it appeared that the names in the box from which the grand jury had been drawn had been placed there by the jury commissioner acting, not with the clerk, but with the deputy clerk who was of the same political party as the jury commissioner. In holding that a plea of abatement on this ground should have been sustained, the court said (p. 511):

> The statute designates the officials who are to select the names to be drawn from for jury service. A body made up of persons not so selected is not the grand jury contemplated by the law. * * * It is a means adopted to secure fair dealing and impartiality in the body entrusted with the power of making criminal charges. There can be no certainty that the purposes of the statute will not frequently be defeated if an indictment, which is seasonably impeached on the ground that it was found by grand jurors selected by persons having no authority whatever to select them, may be sustained because the evidence adduced with reference to it is such as to make it appear that the defendant was not actually prejudiced as a result of the selection of those who preferred the charge having been made without legal authority. * * * With reference to the participation of unauthorized persons in the selection of the names to go in the jury box, from which panels for service are to be drawn, it was said, in the opinion in the case of *United States* v. *Murphy*, (D. C.) 224 Fed. 554, 564:
>
> "The law has specified who is to make the selection of jurors, and it is unsafe and unwise to permit a departure from its provisions. Courts cannot stop to inquire in each case whether such participation, however indirect, has been harmful in a given case. The only safe rule is to prohibit and condemn it absolutely."

> The designation made by the statute of the officials charged with the duty of selecting the names to be drawn from to make up grand and petit juries is a means adopted to prevent the pollution of the stream of justice at its source. The provision was intended to guard the administration of the criminal law against improper influences. The court is not vested with a discretionary power to dispense with a compliance with an essential feature of a safeguard prescribed by law.

In addition to the other Federal cases on the subject this court has twice recognized that, where the jury list is selected by other than the designated officials, the whole proceeding of forming the panel is void. *United States* v. *Gale*, 109 U. S. 65, 71; *Rodriguez* v. *United States*, 198 U. S. 156. And the Government's present appeal to the "discretion of the trial judge" (Gov't Br. 56) is no answer, since denial of the fundamental right to trial by a jury representing a fair and impartial cross-section of the community is a plain abuse of discretion. Cf. *Langnes* v. *Green*, 282 U. S. 531, 541; *Burns* v. *United States*, 287 U. S. 216, 222-223.

IV.

The Alleged Indictment is Fatally Defective in Failing to Inform Petitioner of the Charge Against Him and in Charging a Conspiracy to Commit a Substantive Offense Which Itself Required Concert of Action and Plurality of Agents.

(Pet. Br. 27-31; Gov't Br. 43-49.)

This subject is adequately covered in petitioner's main brief, for the Government in its answer merely ignores the plain language of the indictment.

V.

Petitioner, By Action of the Trial Court and Through No Fault of His Own, Was Deprived of Effective Assistance of Counsel in Violation of the Fifth and Sixth Amendments.

(Pet. Br. 31-37; Gov't Br. 56.)

The Government's contention that both Stewart and Glasser consented to the trial court's appointment of Glasser's counsel Stewart to act also as counsel for Kretske, whose interests were inconsistent with those of Glasser, is obviously ill-founded.

Initially, Stewart objected to appointment (R. 180). Glasser objected to the appointment in unequivocal terms (R. 181). After the court had indicated that he intended to proceed immediately with the selection of a jury (R. 181), Kretske said he could "accept the appointment" (R. 183). To this Glasser's counsel Stewart merely stated immediately that

> As long as the Court knows the situation. I think there is something to the fact that the jury knows we can't control that (R. 183).

Nothing in this language indicates a waiver by Stewart of either his or Glasser's objection. At most it was a resignation to and recognition of the court's orders; in so doing, however, he called the jury's attention to the fact that, despite the conflict in interests involved, "we can't control" the situation.

The Government's argument turns entirely upon its contention that, because Glasser did not repeat his objection against appointment of Stewart to act for Kretske, the "implication" is that the "matter was discussed between them and Kretske and that Glasser consented to Stewart's appointment" (Gov't Br. 60). But in these circumstances—

fully apparent to the trial court—the only manner in which Glasser might properly be deemed to have waived his right would be by express statement from him. He had stated his position, had not changed it, and his attorney had no authority from him to change it. For the binding effect upon the client of what the attorney does is not to be extended beyond the actual or implied authority from his client under which he acts. *Barthelmas* v. *Fidelity-Phenix Fire Ins. Co.*, 103 F. (2d) 329, 331. The Government's argument, based upon an "implication" of acquiescence by Glasser is without merit in view of the well-established rule of this Court that it will " 'indulge every reasonable presumption against waiver' of fundamental constitutional rights and * * * 'not presume acquiescence in the loss of fundamental rights'." *Johnson* v. *Zerbst*, 304 U. S. 458, 464; *Aetna Ins. Co.* v. *Kennedy*, 301 U. S. 389, 393; *Hodges* v. *Eaton*, 106 U. S. 408, 412.

Moreover, in thus picking an explanation out of thin air the Government at the same time recognizes that Glasser had given notice to the court that he did not waive his right to exclusive representation by counsel of his choice unhampered by conflicting interests. Any purported or seeming waiver by Stewart was not within the scope of his authority from Glasser. Indeed, in even considering the retainer by Kretske, Stewart's interest in the possible fee placed him in a position conflicting with his duty to Glasser as to this particular question.

The Government concludes its point with the statement that "Glasser can point to nothing in this record covering a month-long trial * * * which shows that he was prejudiced by the fact that Stewart also represented Kretske" (Gov't Br. 62), but Glasser has set forth item after item of prejudice (Pet. Br. 31-37) and, moreover, this Court adheres to "the well-settled rule that an erroneous ruling which relates to the substantial rights of a party

is ground for reversal unless it *affirmatively* appears from the whole record that it was not prejudicial." *McCandless* v. *United States*, 298 U. S. 342, 347, and cases cited. Nor does it avail the Government to attempt to minimize the prejudice to Glasser, for "the constitutional question cannot thus be settled by the simple process of ascertaining that the infraction assailed is unimportant when compared with similar but more serious infractions which might be conceived." *Patton* v. *United States*, 281 U. S. 276, 292; and see *Tumey* v. *Ohio*, 273 U. S. 510, 535.

VI.

The Argument of the Government as to the Evidence Makes Reversal Mandatory.

(Pet. Br. 72-78; Gov't Br. 11-32.)

A. *The Concessions of the United States Require Reversal Under Established Principles of Law.*

The Government at the outset of its argument makes the broad concession (Gov't Br. 12):

> *It is not our contention that the evidence precluded a verdict of innocence, or that it compelled a conviction.* (Emphasis added.)

It is well-established that, where the evidence in a case is as consistent with innocence as with guilt, a conviction cannot be sustained. *Bishop* v. *United States*, 16 F. 2d 410, 417, and cases cited; *Karchmer* v. *United States*, 61 F. 2d 623. The circumstances relied on must not only be consistent with the guilt of the accused but must be inconsistent with every other reasonable hypothesis. *Paddock* v. *United States*, 79 F. 2d 872, 875-876; *Kassin* v. *United States*, 87 F. 2d 183, 184; *Cox* v. *United States*, 96 F. 2d 41, 43. In *Cochran* v. *United States*,

41 F. 2d 193 (C. C. A. 8), the Court had before it a concession by the Government practically identical with that here involved, i.e., "the jury could have acquitted him [the defendant] without being inconsistent with the record"; and the Court said (p. 206):

> "If, as conceded by counsel for the government, the jury might have acquitted him without being inconsistent with this record, then the circumstances proved are not inconsistent with the theory of his innocence, and his guilt has not been proven by substantial evidence beyond a reasonable doubt. The lower court should have granted his motion for a directed verdict."

Thus the Government has conceded its case by its disavowal of any "contention that the evidence precluded a verdict of innocence" (Gov't Br. 12).

B. *The Circumstantial Facts in Evidence and All Facts That May Be Reasonably Inferred from Them Fall Far Short of Excluding the Hypothesis of Innocence, and the Verdict Thereon Was Obviously Founded on Pure Conjecture and Speculation.*

The petition for certiorari challenged the Government to point to any evidence in the record which might properly be regarded as showing any connection between Glasser and the alleged conspiracy (Petition for Cert., p. 49). In his main brief, petitioner has pointed out the established principles by which sufficiency of evidence in conspiracy cases is to be weighed (Br. 73-75) and the Government has in no way questioned the correctness of that statement. Petitioner again said in his brief on the merits (Pet. Br. 78):

> "If it can, let the Government select any one or more prosecutions handled by the petitioner which it may choose, together with a careful statement of the cir-

cumstantial facts adduced and all facts which it deems such facts to prove. If upon such a statement, it appears that the ultimate fact of Glasser's guilt of conspiracy may be inferred from such circumstantial facts in evidence, then petitioner will confess the point."

In response, the Government has now (1) produced a 54-page appendix which, while reflecting long study and an admirable degree of industry, merely purports to restate some[3] of the circumstantial evidence adduced as to each case handled by Glasser and (2) a purported summarization of the evidence as to certain of these cases and incidents (Gov't Br. 13-31) which includes (3) its argument as to the probative value of the circumstantial facts so summarized (Gov't Br. 30-31).

The Government concedes that circumstances as to no single prosecution are sufficient to sustain the verdict.—In its summary (Gov't Br. 31) the Government states its argument. First it admits that "no single case and no single incident compel the conclusion of Glasser's guilt," but then it argues that "nevertheless the cumulative effect is considerable." The Government thus concedes that, with regard to each of the prosecutions handled by Glasser, the prosecution has failed to supply in the chain of circumstances some one or more links essential to "compel the conclusion of Glasser's guilt."

As pointed out above, unless the chain of circumstances compels the conclusion of guilt and is inconsistent with any hypothesis of innocence, the circumstantial evidence has no probative weight whatsoever. For when evidence is consistent with either of two inconsistent hypotheses, it establishes neither. *Stevens* v. *The White City*, 285 U. S. 195, 204; *Gunning* v. *Cooley*, 281 U. S. 90, 94; *New York C. R. Co.*

[3] Petitioner does not concede that it states all the relevant facts as to each case, and foregoes detailed consideration of the innuendoes and conjectures which appear in the footnotes to this appendix.

v. *Ambrose*, 280 U. S. 486, 490; *Chicago, M. St. P. Ry. Co.* v. *Coogan*, 271 U. S. 472, 478. *A fortiori*, in criminal cases where the presumption of innocence obtains and the guilt of the accused must be established beyond a reasonable doubt, the inference of innocence is required to be adopted rather than the inference of guilt, even though (as is not true here) the latter be equally tenable.

The cumulation of non-probative and unrelated sets of circumstances cannot create substantial evidence.—Moreover, the Government admits that, in each chain of circumstantial evidence as to each prosecution handled by Glasser, there are some missing links but argues that "nevertheless the cumulative effect is considerable" (Gov't Br. 31).

If, by this, the Government means only that there was some ground of suspicion, it is not enough. For the evidence must be substantial and, where the circumstances lead as rationally to the conclusion of innocence as that of guilt, there is nothing to submit to the jury. *Towbin* v. *United States*, 93 F. (2d) 861, 866-867, and cases cited. If the statement of the Government means that by grouping and considering en masse all of these suspicions, broken strands, and sets of circumstances—which, in each separate case, are admittedly lacking in essential links and therefore form no complete or adequate chain of proof—they lend strength to each other, nevertheless the case for the prosecution still remains nothing more than an accumulation of uncertain innuendoes wholly insufficient to sustain a finding of guilt.[5]

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[5] This effort to cover up lack of probative circumstances by mere volume is confirmed by the fact that the Government here admits that, for some failures of prosecution, "there appear, indeed, to be satisfactory explanation" (Gov't Br. 12). After naming one such case (Gov't Br. 12, n. 3) the Government not only fails to point out the others that fall within this concession, but persists in including this very case in its summarization of evidence relied upon (Gov't Br. 14, 15, App'x 103-105). The transparency of the argument is therefore obvious.

The so-called common pattern of inferences suggested by the Government is not permitted by the circumstances of any one of the cases upon which the Government relies, and there is no direct evidence against Glasser.—The Government asserts that a common pattern "runs throughout the specific cases here involved" (Gov't Br. 31), and it twice states this pattern in precise words as follows:

(Gov't Br. 11)	(Gov't Br. 31)
(1) apprehension of violators and investigation of the specific cases by the Alcohol Tax Unit;	
(2) presentation of the material uncovered by the Unit to Glasser;	Persuasive evidence of the guilt of the potential defendants * * * was available to Glasser at the time.
(3) concurrent action by Kaplan or Kretske, directly, or through Horton, to solicit money from the prospective defendants upon the promise that the case would be settled satisfactorily to such prospective defendants, such settlement to be obtained by transmission of the money to Glasser; and	Horton * * * displaying a suspicious advance knowledge of the proceedings, sought out the potential defendants. The latter were directed, usually by Horton, to Kretske. Kretske, in turn, suggested his ability to "fix" the case and solicited money, announcing it was to go to Glasser. Kretske then referred the matter to Roth.
(4) the disposition of the case, handled by Glasser, in the manner promised by Kretske, Kaplan, and Horton.	Thereafter, except where payment had been refused or where the evidence indicated Glasser found he must proceed because of pressures, the case, in one way or another, died.
(5)	Glasser's inability, on the stand, satisfactorily to explain the history of many of these suspicious cases.

While the Government asserts "direct evidence of the improper actions of * * * Glasser" (Gov't Br. 11) and "direct evidence of * * * Glasser's participation" (Gov't Br. 31), there is in fact no such direct evidence—as the adoption of the Government's "common pattern" theory (Gov't Br. 31), necessarily admits. Moreover, the petition for certiorari (pp. 31-50) thoroughly explores and demonstrates the lack of alleged "direct" evidence.

Indeed, the very statement of the Government's "pattern" discloses that, even if it existed, the Government has no case for it is admittedly based wholly upon suspicions—Horton's "suspicious advance knowledge", the suspicion suggested by the assertion that the cases "in one way or another died", and Glasser's alleged inability "satisfactorily" to explain "many" of these "suspicious cases". But, to demonstrate that even this theory of the Government is specious, petitioner sets forth below an analysis of every one of the cases mentioned by the Government as sustaining its "pattern", from which it clearly appears that there is not the slightest showing of evidence of guilt, wrongdoing, or misfeasance by Glasser.

In reviewing the evidence, there are certain obvious facts: (1) Glasser was not a police officer, and it was not he but the Alcohol Tax Unit that was charged with the duty of investigation and of making reports to him (R. 898). (2) Glasser had no means of advance information as to law violations superior to that of agents in the Alcohol Tax Unit or others who might see the reports as they came to Glasser through the ordinary channels, and the issuance of search warrants was handled entirely by others (R. 949). (3) The phrase "prosecutions * * * died" even has reference to cases in which Glasser obtained indictments on dates only four or five months prior to the time he ceased to handle the Alcohol Tax call on March 20, 1939 (R. 705), so that, in the ordinary course of events, the cases would not have

been, and were not, reached.[6] (4) Reports from the Alcohol Tax Unit agents are not in themselves evidence and are often inadequately supported by testimony of available witnesses. (5) In many of the cases as to which the Government asserts there was "persuasive evidence of the guilt of the potential defendants" the record shows that during the eleven month period elapsing between the date Glasser ceased to handle these matters and the date of his trial, Glasser's successor Ward, who was also the prosecutor here, also failed to prosecute by indictment or after indictment failed within five months to proceed to trial. (6) And, unless the existence of the conspiracy and Glasser's participation therein are in some way shown by some independent evidence, the alleged statements of Horton and Kretske that in some instances the money was to go to "Red" are not competent and cannot be considered evidence against Glasser. *United States* v. *Renda,* 56 F. (2d) 601, 602; *Minker* v. *United States,* 85 F. (2d) 425, 427. See Pet. Br. 73 and cases cited.

There are 18 cases upon which the Government predicates its "common pattern" and eight items upon which it claims direct evidence against Glasser. The Government treats these cases in four groups: (a) "The Hodorowicz Brothers cases" (Gov't Br. 13-22). (b) "The cases involving Kaplan and his associates" (Gov't Br. 22-26). (c) "Other cases" (Gov't Br. 27-29). (d) And "direct evidence" (Gov't Br. 28-30). These are discussed, for convenience of the Court, in the same grouping and numbered consecutively as they appear in the Government's brief, as follows:

[6] That this is not an unreasonable period of delay appears from the well-known fact that the Attorney General in his annual report has been accustomed to show the number of cases undisposed of within what might be regarded as a normal if not an ideal period of time. In civil cases the norm adopted was six months after issue joined, and in criminal cases six months after the return of the indictment. See Henry P. Chandler, The Administrative Office of the United States Courts, 2 F. R. D. 53, 60, 62.

(a) The Hodorowicz Brothers Cases.

The Government lists 8 cases involving the Hodorowicz brothers (Gov't Br. 14):

(1) *The 119th Street still (Gov't Br. 15, 98-99).*—The evidence shows merely that one Joppek was picked up and released by Glasser before any of the alleged payments of money were solicited or made (R. 239). It may be assumed, without conceding, that Swanson and Del Rocco paid money to Horton as the Government states (Br. 15) and that Swanson and Del Rocco operated this still (R. 225, 242). The significant fact is that no report was ever made to Glasser by the Alcohol Tax Unit investigators. The inference that Glasser received money is precluded by the fact that he is not shown to have known more than that a minor figure had been arrested in connection with a raid on a still on 119th Street. The case permits of no inferences of advance knowledge through Glasser, or that the case died, or that there was even evidence available to Glasser or anyone else—for the Alcohol Tax agents never submitted a report.

(2) *The Peter Hodorowicz-Walter Hort case (Gov't Br. 15, 99-100).*—It appears that the money in this case was paid to one Miller (R. 307) identified only as a bootlegger (R. 308). There was no advance knowledge by Miller; there was no announcement that money was to go to Glasser; Glasser explained that the Alcohol Tax investigator in the case asked that it be withdrawn from the grand jury (R. 948-949);[7] and the conclusive fact is that Miller is nowhere in the record shown to have had any relations or even acquaintance with Glasser or any of his alleged co-con-

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[7] That there is nothing inherently suspicious, much less evidentiary of wrongdoing, in the withdrawal of a case from a grand jury is shown by the fact that prosecutor Ward withdrew a case from the May 1938 Grand Jury (R. 600). Indeed, Ward later directed the same grand jury in another case to vote a no-bill after it had voted a true bill (R. 610).

spirators (R. 310). It may be noted that Glasser later convicted Peter Hodorowicz in another case (R. 322).

(3) *The Walter Hort case (Gov't Br. 16, 100-101).*—Here again the payment was made to the mysterious Miller (R. 308-309). To infer that Glasser received the money would be gross conjecture. The defendant was discharged by the United States Commissioner (R. 268, 287) but Glasser did not handle the case (R. 287). Since, as the Government's analysis shows, his name was not even mentioned in connection with the case (Gov't Br. 100-101), there was no occasion for him "to advert" to it in his testimony as the Government contends he should (Gov't Br. 101).

(4) *The Zarratini case.*—The Government, although listing (Gov't Br. 14), does not discuss, this case in the brief proper. See Gov't Appendix, pp. 101-102.[8]

(5) *The Clem Dowiat case.*—The Government admits that there was no arrangement in this case (Gov't Br. 15, note 6). Its narrative (Gov't App'x 102) shows no payment of money. As to the Government's bald assertion that it was a "clear violation" though the grand jury returned a no-bill (App'x 102), it may be noted that the agent told his whole story of the case to the grand jury which voted a no-bill (Gov't App'x 102). The presumption that the grand jury faithfully discharged its duty must prevail. *Cox* v. *Vaught*, 52 F. (2d) 562, 564. It might well be that the grand jury under its instructions from the judge deemed the evi-

[8] There is nothing in the record to show what evidence was available against the accused, who had been indicted but was found not guilty. When first questioned as to this matter, Frank Hodorowicz, the sole witness, had no recollection of any conversation with Kretske with regard to it (R. 296). After an adjournment until the next day (R. 301), he gave testimony that he had offered money to Kretske who refused it allegedly because the accused "talks too much" (R. 305). Plainly, part of the theory of the Government to show guilt is the acceptance of money by Kretske. Here, that Kretske did not take money, is as to Kretske anomalous. As to Glasser it shows nothing.

dence (R. 355-356) inadmissible because obtained by search of a car without a search warrant and without reasonable cause to believe that the alcohol thought to be in the car was non-tax-paid. While Glasser presented the case to the grand jury, neither the Government's "pattern" nor any other inference against Glasser may be drawn from the case. The Government's only suggestion is that "Glasser offered no explanation of this case" (Gov't Br. 102). Moreover, it may be noted that Glasser later had Dowiat indicted, and convicted (R. 322, 709).

(6) *The 118th Place still.*—The Government admits that this case is "satisfactorily explained" (Gov't. Br. 12, note 3).[9] See Pet. Br. pp. 75-76.

(7) *The Stony Island still case (Gov't Br. 17, 20).*—Glasser obtained an indictment against Anthony Hodorowicz, Swanson and Dowiat a few days before February 16, 1938 (R. 835). Although the case was set for trial on May 5 (R. 836), Glasser testified that he struck the case from the call—not permanently but with leave to reinstate—at the request of Ritter, the investigator in charge of the local Alcohol Tax Unit agents, who stated he lacked sufficient evidence (R. 920). The Government admits that Ritter, though available, was not called to rebut Glasser's statement (Gov't Br. 17, note 11); and the necessary inference is, of course, that if called, his testimony would have been unfavorable to the Government (see cases cited in Pet. Br. 44). The Government complains that the indictment was never brought to trial (Gov't. Br. p. 17), suggests that a report

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[9] The Government's suggestion (App'x. 105, note 8) is that there was evidence from which the jury could have inferred that Glasser advised Kretske to have the defendants claim ownership of the still to support their petition to suppress the evidence. However, the circumstantial evidence points no more to Glasser than to any other Chicago lawyer, for any lawyer of average intelligence could have given such advice and certainly Kretske (who had been an Assistant United States Attorney) did not need it.

by Bailey in April, 1938, supplied the lack of evidence, complains that Glasser did not explain this (App'x. 108-109), and states (Gov't. Br. p. 17):

> The three were never thereafter tried on this indictment, and none of the others involved in the still was indicted.

But even suspicion that Glasser was guilty of wrongdoing is removed by the fact that, after Glasser ceased handling the alcohol tax call on March 20, 1939 (R. 705) and as late as the date of Glasser's trial February 6, 1940, the District Attorney's office had not seen fit to reinstate the case for trial (Exhibit 226, introduced R. 1034). The Government's vague reference to "others involved in the still" who were not indicted (Gov't. Br. 17) apparently refers only to Joppek (Gov't. App'x., p. 106), but he died or was killed (R. 237, 769) prior to the seizure of the still (R. 247, 385).

Accordingly, the Government's pattern fails here since the case was merely stricken with leave to reinstate, and the case therefore never "died"; failure to prosecute creates no inference against Glasser, since his successor has not resumed the prosecution and it appears that two of the accused, who were the Government's own witnesses in this case, testified that they were innocent (R. 346-347, 272), while the third did not confess his guilt until long after Glasser left office (R. 236).

(8) *The general investigation of the Hodorowicz group (Gov't Br. 17-22).*—The substance of the Government's argument regarding the Hodorowicz group is: Despite the fact that there was "much evidence of conspiracy as well as of substantive offenses", Glasser did not present to a grand jury any conspiracy cases but presented and secured two indictments and convictions for substantive offenses in what the Government chooses to call "minor" cases. The Government here merely adopts as correct the

view of an Alcohol Tax Unit agent that a conspiracy indictment against a large number, including minor figures and carrying only a 2-year penalty, should have been obtained (R. 709, 706-711). Against this was the deliberate judgment of the District Attorney (R. 903) and Glasser (R. 1004-1005) that it was best to indict the principal figures on evidence showing wholesale dealings (R. 709) for substantive offenses carrying 5-year penalties. Their determinations conformed to the concluding statement of Bailey in his own report on this case (Exhibit 160, introduced R. 712):

> Unless the principals involved are severely dealt with, it will be impossible to seriously hamper the illicit violations controlled by them.

The Government's pattern clearly does not obtain here. There was no payment of money; the case did not "die", for Glasser indicted and convicted the principal figures (R. 711); the availability or sufficiency of the evidence for a conspiracy count is at least doubtful since there were no subsequent prosecutions or convictions in this case by Glasser's successor (see R. 1006); and the case was satisfactorily explained by Glasser.

(*b*) *The Cases Involving Kaplan and His Associates.*

The Government lists five cases in which Kaplan and his associates were involved (Gov't. Br. 22), as follows:

(9) *The Western Avenue Still (Gov't Br. 22-24).*—The only showing of evidence of guilt in this case to which the Government refers did not became available until long after Glasser left office in April, 1939 (R. 912), *i. e.*, testimony of Raubunas in the trial of Glasser (R. 452-454) and the statement of Raubunas given to Investigator Bailey, October 20, 1939, seven months after Glasser left office (Ex-

hibit 92). Regardless of what was in Exhibit 81A (which was clearly inadmissible, see *infra*, p. 51), the probability that it contained no showing which could be sustained by testimony of available witnesses is best gauged by three facts: (1) No arrests were made at the time of the seizure of this still (R. 918 and Ex. 81A). (2) The report of the Alcohol Tax Unit on this case indicates the dubious character of available witnesses. At page 26 of this report, Exhibit 81A, appears this statement:

> It is recommended that Frank J. Hill, Murry Ellis and James Brown be allowed to testify in behalf of the Government at the time this case is called for trial. While they are more or less reluctant witnesses, it is the belief of the investigators that if they are requested to appear at the office of the United States Attorney for the northern judicial district of Illinois before the trial they will testify favorably.

(3) Glasser's successor is shown to have obtained no indictments, although the prosecutor made a shabby effort to create a false inference for the record after the indictment of Glasser by causing the arrest of Louis Kaplan on a complaint issued by the Commissioner on December 15, 1939, the case from time to time being continued until after the trial of Glasser and then by the United States Attorney dismissed on April 12, 1940 (R. 1046-1047).

The Government's pattern here fails in that no suspicious advance knowledge of proceedings is shown; the statement attributed to Kaplan that payments were made to Glasser was made in 1936 (R. 475), 18 months prior to Glasser's presentation of the case to the grand jury (R. 528); the testimony of Raubunas, who made this statement on cross-examination, is repeatedly admitted by the Government to be lacking in inherent credibility (Gov't Br. 23, 30, 118); there is no assertion that Glasser's presentation of the case to the grand jury was improper; that the evidence avail-

able was insufficient is proved by the fact that no indictment was ever obtained by Glasser's successor; and surely there were no circumstances requiring explanation by Glasser beyond his testimony that the evidence was insufficient and required a no-bill (R. 970).

(10) *Spring Grove case (Gov't Br. 23-25).*—On Glasser's first presentation to the grand jury, August, 1937, the Spring Grove case was withdrawn because Glasser felt Cole, admittedly a key witness (Gov't Br. 124), to be unreliable—as he stated to agent White at that time (R. 530-531, 534, 923-925). In addition, Frett, an important witness expected to corroborate Cole (R. 536-537), failed to appear in response to the subpoena issued for him (R. 532). No evidence appears that the United States Marshals, whose duty it was, had served the subpoena; and there is no showing that the failure of the witness to appear was in any way attributable to Glasser.

On the second presentation, set for October 17, 1937, the grand jury minutes showed that no witnesses were heard (R. 528) apparently because Frett, whose testimony agent White said would corrobate Cole (R. 536-537), still did not appear (R. 532). White thought it a good idea to have corroboration of Cole (R. 534). Of course, Glasser was not responsible for production of witnesses, since that is the duty of the marshal who usually acted with the aid of the agents. The testimony of agent White shows that he listed Frett's name for subpoena each time (R. 532), and there is no showing that Glasser failed to obtain subpoenas for Frett on each occasion.

On May 17, 1938, Glasser, apparently despairing of ever obtaining Frett, again presented the case (R. 532). That Cole then testified to all the material facts within his knowledge appears from the testimony of Cole himself (R. 576) and of the foreman of the grand jury (R. 606, 607-608; see

Pet. Br. 64-65). The Government's citations (Gov't Br. 124) fall short of rebutting this testimony (see Pet. Br. 64-65). Ellis, the grand jury secretary on whose testimony (R. 590) the Government relies to show that Cole testified only as to his illness,[11] admitted that the case was twice presented to that grand jury (R. 591). Glasser's belief that Cole was mentally unbalanced and unreliable is confirmed by a perusal of the record of Cole's testimony in this case (R. 571-573), which was so incoherent as to cause the judge to suggest that his testimony before the grand jury be read (R. 572). Defendant's Exhibits 188 and 189 (received in evidence R. 885), which were X-ray photographs of Cole's head, showed gun-shot slugs at the base of Cole's brain (R. 887).[12]

The foreman of the grand jury testified that this May, 1938, grand jury would not indict without evidence which would stand up in court (R. 606) but, if there was evidence sufficient to satisfy them that there was probable cause, they would vote an indictment (R. 608) and that the grand jury used its best judgment as to who to indict and who to no-bill (R. 608).

In an attempt to show wrongdoing by Glasser i.e. that Glasser advised the grand jury concerning whom it should indict, the Government cites (Gov't Br. 24) to the testimony of the Secretary, Ellis, whose testimony commences (R. 589): "I *think* we had a conversation with Mr.

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[11] The Government also relies on Exhibit 96, stenographic transcript of testimony before the grand jury, to show that Cole was before the grand jury only a few minutes and that Glasser questioned him only about his illness (Gov't Br. 124). Although part of this transcript is shown by the record to have been read in this case by the prosecutor (R. 574), Exhibit 96 is nowhere shown in the bill of exceptions to have been introduced in evidence.

[12] The United States attorney took all exhibits after the trial for the purpose of making a list of them (R. 1094, 1096). When he finally returned the exhibits to the clerk of the district court, these photos had disappeared for the clerk does not include them in his certificate (R. 1075, 1087). See Pet. Br. 55-57.

Glasser as to who would be named in a true bill" (emphasis added). He spoke of not knowing "the exact wording" and of "the inference" as to what Glasser might have said. On cross examination he knew nothing except the name of the case and that Cole was a witness (R. 591-601).

As for the Government's "pattern" here, any suspicious knowledge of proceedings in this case, as the Government's citation shows (Gov't Br. 121 note 16), came from agent White to Kaplan and not from Glasser. Of the eight defendants, only Dewes is asserted to have made the payment of money which Kretske allegedly said would be paid to Glasser. It is plain that the prosecution did not die, for five were indicted by the grand jury upon Glasser's presentation (R. 528-529) and Glasser's failure in the 9 months before he left office to bring to trial these five indicted June 1, 1938 (R. 529) is explained by the fact that Anderson, counsel for one of them, was ill with arthritis from November, 1938, down to the time of Glasser's trial and requested several continuances in addition to those necessitated by the fact that Glasser and the trial judge were busy with other cases (R. 823-824, 826). Kaplan and Raubunas, as well as Dewes—the latter being the only one alleged to have paid money to Kretske—were on Glasser's presentation no-billed, but the fact that Ward, Glasser's successor, was able to obtain an indictment against these three in May, 1939 (R. 489, Exhibit 130, received R. 641) falls far short of showing that Glasser had persuasive evidence available at the time of his presentation. There is no showing that Ward obtained the indictment only on the evidence available to Glasser. For example, there may have become available to him the missing witness, Frett, needed to corroborate the testimony of Cole who was deemed unreliable by the grand jury which returned the other indictments on Glasser's presentation (R. 532, 534, 536-537, 607-608). It may be noted that after obtaining these later indictments as

to Raubunas and Dewes, Ward struck these cases with leave to reinstate, obtaining a plea of guilty from Kaplan only after Glasser's trial (see Pet. Br. 60, note 23). It may also be noted that Glasser himself later had Dewes indicted in the *Beisner farm* case, *infra*, in which Dewes was also alleged to have paid money to Kretske.

(11) *The Boguch removal case (Gov't Br. 25).*—This case was not handled by Glasser but by Assistant United States Attorney D. A. Drymalski (R. 291, 783). The Government seeks to draw an inference of wrongdoing by Glasser from the conflicting testimony which, in any event, at most showed merely that Glasser might have been present in the commissioner's office at the time the petition for removal was dismissed (Gov't Br. 128-129, n. 24). Plainly, the Government's "pattern" does not obtain here; and Glasser is shown to have had no relation whatever to the case.

(12) *The Beisner farm still case (Gov't Br. 25-26).*—Of the seven individuals presented to the Grand Jury by Glasser in the *Beisner farm* case it is true that only three were true-billed. But these included Raubunas and Dewes, who are the only persons asserted by the Government to have paid money to Kretske. They were indicted on November 1, 1938 (R. 697-698) and arraigned December 27, 1938 (Exhibit 156). The case did not die. There is no assertion that Glasser's indictment was bad in form. His failure to try the case in the remaining three-month period before he ceased to handle the alcohol tax call, March 20, 1939 (R. 705) permits of no inference even of misfeasance.

As to the four persons who were not indicted by Glasser but were included in the reindictment obtained by Ward (Gov't. Br. 26, Gov't. App'x. 134), it is pertinent that after trial Farber received a sentence of one hour (R. 696), Widzes was placed on probation (Exhibit 168), and Du-

thorn was found not guilty (Exhibit 168). George Neiss (not Weiss) was not apprehended (Exhibit 168). Glasser's judgment, insofar as it may have influenced the grand jury, was better than Ward's because Glasser avoided indictments which could after the expense of trial produce results no more concrete than these.

There can be no application of the Government's "pattern" in this case, and no iota of suspicion can be drawn from it against Glasser.

(13) *Downer's Grove still case.*—Although listed (Gov't. Br. 22) this case is not referred to by the Government in its argument.[13]

(c) Other Cases

Although inferences therefrom are not discussed, the Government states some of the facts relating to certain "other cases" (Gov't. Br. 27-29), apparently deeming them pertinent, as follows:

(14) *Kwiatowski case (Gov't. Br. 27).*—This case is adequately discussed in the Petition for Certiorari, pp. 44-45, and the petitioner's main brief, pp. 76-78. The Govern-

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[13] The Government's detail of this evidence (Gov't App'x p. 135), however, shows that Glasser indicted Slesur and Wasielewski in this case in December, 1938 (R. 623-624, 630). There was no showing of payment of money by either. Wasielewski stated he overheard Kretske promise Slesur that "he would take care of everything with the 'Red head'" (R. 631). But, as the Government points out (Gov't Br. 135), Glasser obtained Slesur's plea of guilty on March 31, 1939. Wasielewski testified to no payment of money by him or promise of non-prosecution as to him. Failure to try Wasielewski in the short three-month period between indictment in December, 1939, and the date Glasser ceased to handle the Alcohol Tax call (R. 705) can properly be attributed only to the condition of the court calendar and the press of business in the United States Attorney's office and not to misfeasance by Glasser. For Glasser's successor Ward, even after Slesur's confession, failed for 8 months to prosecute Wasielewski before December 5, 1939, when he pleaded guilty; and Ward admitted that as to certain of the other defendants in this case, he struck the cause from the docket with leave to reinstate (R. 630).

ment bases its inference of Glasser's guilt in this case on the fact that the statement prepared by Agent Bailey of the Alcohol Tax Unit and read by Prosecutor Ward to the jury (R. 412-414) contains a statement that Kwiatowski gave $600 to Horton after which Horton is alleged to have said "Don't be afraid, I'll fix it" (R. 413). But Kwiatowski on cross-examination was asked if he gave Horton $600 to fix his case, to which he answered, "No, I no give him" (R. 415).

The Government refers (Gov't Br. 27) to a supplemental report by agent Goddard dated December 8, 1938; but that report is shown only to have been made to Ritter, the Investigator in Charge of Agents (R. 585, 918). There is no showing of mailing or other transmission to, or receipt by, the office of the United States Attorney.[14] Glasser's denial that he received it is uncontradicted (R. 963). Furthermore, assuming *arguendo* that Glasser had this report, he ceased to handle the Alcohol Tax call about four months later (R. 705) and still another three months passed before Ward, who succeeded Glasser in handling the alcohol tax call, finally presented the case to a grand jury in June, 1939 (R. 430). Since a total of seven months elapsed before the matter was in the ordinary course of business, presented to the grand jury,[15] no evidence of guilt or misfeasance on Glasser's part can be inferred from this case.[16]

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[14] There has been suggested no ground for invoking a presumption that in the ordinary course such a report, if made to the Investigator in Charge, would be transmitted to the office of the United States Attorney. Such a presumption, if it were attempted to be invoked, must necessarily fall in view of the positive testimony of Judge Barnes to the suppression of a report submitted by an agent but not transmitted to the office of the District Attorney (R. 719-720).

[15] See note 6, page 24, *supra*.

[16] The record further shows that Ward obtained the indictment June 2, 1939; but Kwiatowski was never even arrested, and on January 12, 1940, the case was stricken with leave to reinstate (R. 430). This curious course of events is explained by the fact that 14 days after the indictment

(15) *Abosketes matter (Gov't Br. 28).*—The Government's statement of the *Abosketes* case in the argument is meaningless and shows utterly no connection with Glasser. It plainly intends to rely on the facts stated in the Government Appendix, pp. 137-139. The inference apparently sought to be drawn is that, when Glasser with Bailey visited the prisoner Brown, at the county jail, he learned of the prospect of prosecution of Abosketes and inspired Brantman to solicit money from Abosketes to "fix" the case. But see the opinion of the Circuit Court of Appeals (R. 1127) and Petition for Certiorari, pp. 45-46, showing that Brantman first approached Abosketes prior to the date of the first trip of Glasser and Bailey to see Brown. The Government, contrary to all precedent, attacks the testimony of its own witness Abosketes to the effect that he first met Brantman on February 20 or 22 (Gov't App'x 140, n. 32), because this is at least one day prior to the day (February 23) on which Bailey first told Glasser that he had received a letter from Brown in the county jail and accompanied Glasser to the jail where they conversed with Brown concerning a law violation by Abosketes (R. 647-648, 941). But even if it be conceded that the Government's own witness was mistaken as to the dates and that it may be inferred that Glasser may have known of the impending prosecu-

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and on June 16, 1939, investigator Bailey obtained an amazingly lucid statement (R. 412-414) from the accused who could not read English or understand the language of the statement (R. 416-417). The gist of this statement was the payment of money to Horton (R. 412-414). But the Government could not obtain oral testimony to this effect (R. 409-412) and on cross-examination this witness denied payment to Horton (R. 415).

While it was naturally impossible for Glasser on this trial to show the unconscionable means to which the Government in many instances resorted in obtaining what little evidence it did adduce, this case clearly shows the use of indictment as a means of extorting testimony from a witness and holding the witness to his story. Further evidence of the actions of Alcohol Tax Unit agents in attempting to secure testimony against Glasser is referred to in the Petition for Certiorari, p. 49, note 10, and appears in the record (R. 583-585).

tion of Abosketes before Brantman made his alleged solicitation of money from Abosketes, it is only too obvious that inferences may also be drawn that Brantman received his information from almost anyone other than Glasser, or from any one of the prisoners in the jail (12 of whom, incidentally, had been convicted by Glasser and were familiar with Abosketes) particularly since the record shows that at least one of them informed his wife of Brown's conversation with the "Federal people" on the same day that Brantman solicited Abosketes (R. 669). Moreover, a much more reasonable hypothesis that Bailey, rather than Glasser, was guilty of inspiring the solicitation arises from the facts that: (1) Bailey received the letter from Brown on February 21 and on that day went to see Brown but was unable to see him in private (R. 647). (2) Abosketes was approached by Brantman on February 20 or 22 (See Pet. for Cert. 45-46.) (3) Bailey failed to take the initial step which would start prosecution, for he transmitted no report on the matter to the office of the United States Attorney (R. 940). (4) Later other representatives of the Alcohol Tax Unit suggested that Glasser close the Abosketes matter by permitting Brown and the other prisoners to go to the penitentiary from the county jail where they had been temporarily held (R. 1022, 1024).[17]

If any inference or "pattern" is to be found in these circumstances, it is that Bailey, not Glasser, inspired the solicitation—or at least that any one of many people might have inspired Brantman. Moreover, no case "died" because the Alcohol Tax agents made no report and no prosecution, therefore, could be instituted. And, while money

[17] Not entirely without significance under these circumstances was the visit to Glasser's office by Herrick, assistant to Yellowley, head of the Alcohol Tax Unit (R. 443), apparently made for the sole purpose of personally delivering to Glasser an alleged threat of Abosketes to kill Glasser if he persisted in his attempts to obtain evidence against him (R. 941-942).

passed between third parties who were Government witnesses, they did not mention Glasser in connection therewith and in fact testified that they did not know him (R. 656, 668).

(16) *Case of Leo Vitale (Gov't Br. 28).*—Vitale, represented by one Spatuzzo, pleaded guilty to an indictment for running a still on the farm of Charles Meyers (R. 250-251, 441). There is no suggestion that any money was paid in this case; the defendant was represented by neither Roth nor Kretske and neither these nor any of the other alleged co-conspirators are shown to have had any relation to the case; neither is there any suggestion of any corrupt motive for anything Glasser did or omitted to do in connection with this case. Glasser was not on trial for misfeasance in office or for conspiracy with Leo Vitale or his lawyer, Spatuzzo. Since no legitimate line of presumptions could in any way relate this case to the conspiracy, either to show its existence or as an act in furtherance thereof, it was plainly incompetent. *Boyd* v. *United States,* 142 U. S. 450, 458. The Government's only complaint is that Vitale's sentence was only an hour in the custody of the marshal which Glasser, who prosecuted the case, "could not subsequently explain" (Gov't Br. 28), but Glasser did explain that Vitale had been convicted in the State court for the same offense and it was the policy of the United States Attorney's office not to prosecute for the same offenses in the Federal courts (R. 916; Ex. 208 introduced at 953).

(17) *Libel action against the Chrysler car of Rose Vitale (Gov't Br. 28-29).*—The civil action against the automobile of Rose Vitale arose out of the search of the residence of Leo Vitale in Peru, Illinois, on August 21, 1938, under a search warrant (Exhibit 36). It was tried before Judge Barnes on December 23, 1938 (R. 218-219). Rose Vitale, the wife of Leo Vitale, was the claimant as owner of the car

(R. 222; Exhibit 36). Exhibit No. 36, found in an envelope marked Ex. No. 229, includes a letter transmitting a report on the case. This letter, signed by Yellowley, states:

> There is enclosed report of investigation by Investigator Barratt O'Hara, Jr., dated December 14, 1938, in regard to the merits of the claim of Rose Vitale, 122 E. 11th Street, Peru, Illinois.

Exhibit No. 36 also includes the report thus transmitted. The case was tried upon this report (R. 717) as was the frequent practice (R. 718). The report was read to Judge Barnes by Glasser (R. 873, 717). Judge Barnes ordered the car returned to the claimant because, as he testified, the report was not a sufficient showing upon which to forfeit the car (R. 717-718). The complaint of the Government is that, although agent Dowd had reported to Glasser that Vitale had boasted that "he got out of this for nine hundred dollars" and that Dowd had interviewed a number of witnesses to whom Vitale spoke, Glasser took no action (Gov't Br. 29, App'x 147-148). This argument attributes to Glasser an investigatory duty, which was not the function of his office (R. 898) and even reports that came to the office of the United States attorney were referred to the Alcohol Tax Unit for investigation (R. 898). It is thus highly significant that neither agent Dowd nor any other agent or officer of the Alcohol Tax Unit placed sufficient credence in this rumor to make an investigation or report on the matter. Indeed, in view of the fact that Exhibit No. 36 shows that the Alcohol Tax Unit valued the Chrysler car at only $450, Dowd's suggestion that investigation be made of a rumor that Vitale had paid $900 to get out of this case tended only to raise grave doubt as to the probability that Vitale would have paid twice its value to save the car. Conclusive here is the fact that there is no evidence upon which to found any inference that any money was ever

paid to anyone to "fix" the case, for certainly the hearsay rumor to which Dowd testified cannot be treated as proof of more than the fact that such a rumor was reported to him and even the rumor did not implicate anyone. There is thus nothing in this case from which to infer that the conduct of Glasser therein tended to further the alleged conspiracy, much less does it afford basis for inferring that he had knowledge of, and was party to, any agreement unlawful or otherwise.

(18) *The Wroblewski brothers cases.*—The Government refers to these cases (Gov't Br. 27) but does not discuss them in argument. Reference to Gov't Appendix, pp. 149-152, shows nothing in the Government's discussion of them tending to show that Glasser had any possible connection with the alleged conspiracy.

(d) *"Direct Evidence" of the Participation of Glasser.*

Under this misleading heading (Gov't Br. 29) the Government sets out references to items of evidence (Gov't Br. 30-31) none of which involves testimony by the witnesses of their own knowledge of the fact to be proved—participation of Glasser in the alleged conspiracy. These testimonial statements hence fall far short of being "direct evidence". *United States* v. *Greene*, 146 Fed. 803, 824; *People* v. *Palmer*, 11 N. Y. St. Rep. 817, 820; *State* v. *Riggs*, 61 Mont. 25; *State* v. *Blackwelder*, 182 N. C. 899; *State* v. *Gatlin*, 170 Mo. 354; 1 Greenleaf, Evidence, sec. 13. Indeed, they fail to ascend even to the dignity of circumstantial evidence since no one of them gives rise to a legitimate inference of such participation by Glasser. These may be considered *seriatim*, as follows:

(1) ***Kretske's alleged statements that payments of money were to go to "Red" (Gov't Br. 30).***—As its first item of direct evidence, the Government points to state-

ments of its witnesses that Kretske said that money he received from defendants or prospective defendants would be paid to "Red" (Gov't Br. 30). Kretske never said he paid over any part of these moneys to Glasser. The most the Government shows is that third-party clients of Kretske testified that Kretske so intimated to them. Thus, not only was their testimony plain hearsay as against Glasser, but such statements made outside the presence of Glasser could of course never constitute direct evidence. They are not even circumstantial evidence, and were incompetent to prove anything against Glasser unless and until, by some independent evidence, it was first shown that he had joined in the alleged conspiracy so as to make Kretske's statements those of a co-conspirator and his statements binding against all the conspirators.

(2) *Testimony of Raubunas that he saw Glasser with Kretske and Kaplan (Gov't Br. 30).*—Raubunas testified that meetings of Glasser and Kretske with Kaplan took place in May, August, and October, 1936 (R. 457-458, 462). In the first place, the Government admits that testimony of Raubunas was subject to a "probable lack of inherent credibility" (Gov't Br. 23) and that Raubunas here testified "perhaps not entirely convincingly" (Gov't Br. 30). In any event, it is clear that knowledge of the conspiracy among the other defendants cannot be inferred from casual and unexplained meetings with such other defendants who are convicted of conspiracy. *Falcone* v. *United States*, 311 U. S. 205, 210. It may also be noted that Raubunas, at the time of the trial, was serving a three-year sentence after conviction on an indictment obtained by Glasser (R. 452, 697-698).

(3) *Svec's testimony as to facts "indicating" meetings between Glasser and Yarrio (Gov't. Br. 30).*—Paul Svec's testimony "indicating" meetings between Glas-

ser and Yarrio, a bootlegger indicted but never convicted,[18] (R. 563-564) was that sometime between August 1937 and June 1938 he had seen Glasser twice drive by a barber shop and sound his horn, whereupon Albert Yarrio (R. 194) looked out the window, saw a green Buick rolling by, left the barber shop in the same direction in which the car went and returned in five or ten minutes.[19]

Suggestion that this evidence indicates a meeting would require an inference that Yarrio left the barber shop on signal from Glasser and upon this inference the piling of a second inference that such a meeting took place, a course of reasoning recognized in no court. And, assuming *arguendo* that these meetings took place, they are not only meaningless and of no legal significance (*Falcone* v. *United States, supra*), but Yarrio had utterly no connection with the alleged conspiracy here. Again assuming that there were such meetings, it is plain that they could have had nothing to do with the indictment of Yarrio to which the Government refers (Gov't Br. 30) since that was dismissed on April 1, 1936 (R. 195) more than 18 months earlier, and there is no suggestion that Yarrio had any connection or relation with any of the alleged conspirators or did any act which furthered the conspiracy. Moreover, according to the testimony of one of the Government's own witnesses, an F. B. I. agent, Svec had earlier admitted that in fact he had never seen Glasser outside the Federal Building with Yarrio, alias Alberts, or otherwise (R. 583-584); and in his cross-examination Svec stated that he had then spoken "truthfully" (R. 566).

(4) *Alleged apology, and advice on attorney, to Hodorowicz (Gov't Br. 30).*—The Government insists (Gov't Br.

[18] The record shows without contradiction that this indictment was dismissed for want of prosecution because the witness could not identify Yarrio (R. 931, 979).

[19] Stricken was Svec's testimony that Yarrio at the time said, "That is Red, I guess I have to go see him" (R. 563, 569; Gov't Br. 86).

30) that "Glasser, after Frank Hodorowicz had been indicted, apologized to Frank" and "advised him on a choice of his attorney." Far from showing any apology, the Government's citations to the record show that Glasser flatly told Hodorowicz he would have to go to jail for five years (R. 302). Glasser's statement that "Bailey says he will get my job if I don't put you [Hodorowicz] away" was by Bailey's own testimony spoken in jest in the public corridor of the courthouse in the presence of Bailey and others (R. 710). Nor is there any support for the Government's suggestion that Glasser explained he would have to convict Hodorowicz "because the situation was becoming uncomfortable for Glasser" (Gov't Br. 30). The statement above-quoted as to Bailey and Glasser's further statement that Bailey was after him all the time (R. 304) fall far short of supporting the Government's purported epitomization. Glasser's statement that if it had been an ordinary case it could be handled differently (R. 304) is directly referable to the testimony of both Judge Igoe and Glasser that if possible, and because of his notoriety as a large-scale violator, they intended to convict Hodorowicz on a long-term substantive count rather than a mere two-year conspiracy count (R. 891-892, 1004).

Glasser's alleged advice to Hodorowicz concerning choice of attorney consisted in saying that of three mentioned by Hodorowicz, "any one of them are alright" (R. 303). Apparently included was Hess (R. 302) and Glasser said "Hess could do a lot of good" (R. 303) [20] but, Hodorowicz testified, Glasser also said (R. 303-304) that

> For all the money in the world you can't do anything on this case. * * * For all the money in the world he [referring to Hess] can't do you no good this time.

[20] There has at no time been any suggestion that attorney Hess was in any way connected with the alleged conspiracy. Glasser's open recognition that he could be of assistance to Hodorowicz as compared with Roth, whose services Hodorowicz dispensed with, contradicts any theory of conspiracy with Roth as charged by the Government in the present case.

Plainly there is no basis here upon which to found an inference of wrongdoing, much less wrongdoing in furtherance of any conspiracy, by Glasser who, instead, plainly stated that the prosecution would be relentless.

(5) *Glasser's expulsion of Dowd from the court room in the Rose Vitale libel case.*—It is plain that Glasser's action in ordering Dowd from the courtroom in the Rose Vitale libel case, to which the Government refers (Gov't Br. 30), can be no indication of participation in the alleged conspiracy. To insist, as the Government does (Gov't Br. 30), that it is evidence thereof is frivolous. Neither does the testimony as to the occasion for Glasser's action have greater probative value. Dowd's request that Glasser put him on the stand to show "what kind of a man this fellow is" (R. 220) conveyed to Glasser no idea that Dowd had any knowledge of facts, other than those shown in the report, relevant to the sole issue before the court—whether Leo Vitale or any other person had used the car for the purpose of defrauding the revenue. Judge Barnes, who tried the Vitale libel case, testified for Glasser that he already knew "the claimant was the wife of the bootlegger" (R. 717) and that he, the court, "had no more right to take that car than * * * to take yours" since there was no sufficient evidence (R. 718, 717-718). Certainly, this incident is evidence, direct or otherwise, of nothing respecting the alleged conspiracy.

(6) *Glasser's "release" of Joppek (Gov't Br. 30).*—It is sufficient to note that the release of Joppek by Glasser on February 29, 1937, when he was picked up in connection with the 119th street still because he had signed the lease and paid the rent on the premises (R. 249-250) occurred prior to the alleged payment of money to Horton by Swanson and Del Rocco (R. 228, 239). As shown above, no report was ever made by the Alcohol Tax Unit so that Glasser

could undertake no prosecution. The only proper inference here then is that the agents concluded they did not have enough evidence against anyone to justify a report in this case. If it is to be inferred that money was paid to any law enforcement officer and resulted in the "fixing" of the case, then it must have been paid to the agents who declined to make a report which would have enabled Glasser, as the representative of the United States Attorney's office, to proceed with a prosecution. Certainly there is no evidence of conspiracy by Glasser—direct, circumstantial, or otherwise.

(7) *Glasser's "release" of Raubunas on Christmas eve (Gov't Br. 30-31).*—Raubunas was picked up on December 24, 1936, by Agent Campbell and brought to Glasser. After conference between Campbell and Glasser beyond the hearing of Raubunas, Glasser stated to Raubunas (R. 464):

> I guess it be alright to let you go today, day before Christmas. Come over Monday, 10:00 o'clock.

But this was merely Raubunas' testimony. He said he was in the custody of Campbell, an agent of the Alcohol Tax Unit. Glasser had no control over him. The remark, if made by Glasser, was apparently acquiesced in by Campbell. Neither Campbell nor any other representative of the Alcohol Tax Unit complained, though Campbell himself testified for the Government on other matters (R. 444-452).[22] There was no report to Glasser on Raubunas. There was no

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[22] There was every reason why Campbell should have testified if he felt anything amiss in this situation, for the record shows that Kaplan told Raubunas not to return to the Federal building after Raubunas told Kaplan that Campbell, not Glasser, had asked him to return (R. 464). Earlier in the same month Kaplan had warned Raubunas that Campbell was looking for him and had instructed Raubunas not to say anything to anybody (R. 463), which could not have come from Glasser since the report on the Western Avenue still case did not reach Glasser until July 1937 (Ex. 81, received R. 529).

case or proceeding of any kind pending in the United States Attorney's office against Raubunas at that time. The whole incident, if it ever occurred, is nebulous and is far from constituting any "release" of Raubunas by Glasser as the Government implies (Gov't Br. 30-31). Indeed, elsewhere the Government in its brief (pp. 23, 30, 118) repeatedly insists that Raubunas' testimony was without "inherent credibility" (Gov't Br. 23).

(8) *Glasser's "receipt and acceptance" of a case of liquor sent by Frank Hodorowicz.*—Finally, the Government with something of a flourish states that "there is uncontroverted evidence that Glasser received and accepted a case of liquor sent to him for Christmas by Frank Hodorowicz" (Gov't Br. 31). It is true that Hodorowicz testified that he had sent a case of liquor to Glasser on Christmas 1937 (R. 302); but as a matter of fact Glasser freely admitted that an anonymous gift of liquor had arrived at Glasser's office in the Federal building where it was opened by him "and • • • passed • • • out to my associates" (R. 950-951). Glasser was not cross-examined on the incident or his explanation (R. 954-1027). There was nothing clandestine about it so far as Glasser was concerned. That the receipt of this liquor was nothing more than an anonymous gift to a public officer and is wholly without significance here is demonstrated by the fact that Glasser later had the Hodorowicz brothers and their nephew indicted and convicted (R. 322).

Conclusion.—It is obvious that none of the cases to which the Government refers and which it purports to summarize by pattern (Gov't Br. 31) involves circumstances which may properly be said to constitute evidence from which the jury could as a matter of law draw any inference of guilt of Glasser.

Bereft of any direct or other evidence implicating Glasser, the Government adopts the theory that 18 cases handled by Glasser show what it calls a "common pattern" of circumstantial evidence as follows: (1) Apprehension of liquor law violators and a report thereon to Glasser; (2) followed by solicitation of funds from the accused persons by Kretske, Kaplan, or Horton, to be paid to Glasser; (3) thereafter the disposition of the cases favorably to the accused who had so paid money to Kretske, Kaplan, or Horton, and (4) no satisfactory explanation by Glasser as to the disposition of the cases. But, upon undisputed evidence, every one of these cases discloses one or more absurdities in the Government's claim of a so-called "common pattern". In three of them the Alcohol agents never even made a report to Glasser; in four of them Glasser did not even handle the cases; in nine of them there was not even a hint of solicitation or payment of money to co-defendants Kaplan, Kretske, or Horton, the alleged co-conspirators, directly or indirectly; three of them were suspended at the request of the Alcohol agents; in two of them the court found the evidence not sufficient; in six instances the accused was later indicted or convicted by Glasser; in four, the accused pleaded guilty; in two of them Glasser left office before the case could be tried; and in three adequate evidence was not supplied until after Glasser left office. Thus, for one or more reasons, the Government's "common pattern" is not only untenable but absurd.

Glasser handled more than a thousand formal cases in the District Court in his four years in office (R. 965-966) and unnumbered additional cases before grand juries, United States commissioners, in the United States Attorney's office, and before the Circuit Court of Appeals. From this volume of business the Government has selected the 18 so-called "pattern" cases listed above and the 8 instances of so-called "direct" evidence of wrongdoing by

Glasser—none of which raises more than a poor suspicion at most, and all of which are not merely satisfactorily but conclusively explained to Glasser's credit.

Glasser did nothing that an innocent man might not do. Upon the merits, therefore, his conviction is a plain miscarriage of justice.

VII.

The Conduct of the Trial Judge Was Highly Prejudicial to Petitioner's Right to a Fair Trial

(Pet. Br. 37-54; Gov't Br. 67-81).

The Government cannot avoid the misconduct of the judge on the ground that insufficient exceptions were taken. —As to the misconduct of the trial judge, the Government first seeks to avoid the questions raised, on the ground that the accused did not properly preserve the error. But, at the outset, it is to be noted that the cases cited by the Government are not precedents for the proposition that failure to object to the actions of the judge in any way bars this court from considering clear error. Thus, in *Troutman* v. *United States,* 100 F. 2d 628, 634, cited by the Government itself (Gov't Br. 68), the court added:

> Where life or liberty is involved, an appellate court may notice and correct a serious error which was plainly prejudicial without it being called to the attention of the trial court, and even though it is not presented by assignment of error.

The same principal applies in this Court, *United States Supreme Court Rules* 26(7); *Weems* v. *United States,* 217 U. S. 349, 362; *Wiborg* v. *United States,* 163 U. S. 632, 658, and has peculiar application where basic rights, such as the right to fair trial, are involved. *Weems* v. *United States,* 217 U. S. 349, 362. And that it has special application to misconduct of the trial judge was recognized in

Adler v. *United States*, 182 Fed. 464 (C. C. A. 5) where the court said (p. 472):

> Defendants counsel is placed at a disadvantage, as they might hesitate to make objections and reserve exceptions to the judge's examination, because, if they make objections, unlike the effect of their objections to questions by opposing counsel, it will appear to the jury that there is direct conflict between them and the court. • • • And the judge can more easily treat counsel with the respect due an officer of the court in the performance of a duty, if he avoids the performance of the duties incumbent properly upon an attorney representing one side of the case. The evidence, taken as a whole, might be so conclusive of the defendant's guilt that an appellate court would not be justified in interfering with the judgment on this account alone. But in a case where there is substantial conflict in the evidence as to the essential points that were required to be submitted to the jury, the course of the judge in unnecessarily assuming to perform the duties incumbent primarily upon others might make it the duty of an appellate court, on this ground alone, to grant a new trial.

Recognizing this same principle, in *Williams* v. *United States*, 93 F. 2d 685, 690, the court said:

> Counsel are not held to strict accountability for failure to object or except when the questions are asked *by the court.*

The intentions of the judge, even if they could be known, are immaterial.—In the margin of the text of its brief stating unquestioned rules governing the conduct of trials by federal judges, the United States presents its interpretation and summarization of the record of the judge's conduct in this case. While, in at least one instance, the Government concedes that the trial "court fell into error" (Gov't Br. 71 note), it first seeks to excuse the conduct of the judge

on the ground that it was "based upon a mistaken assumption", that his actions were not "deliberately calculated to prejudice" defendants and that the court was "confused" (Gov't Br. 71), and that his differentiation in dignity of witnesses "may have been passed in jest" (Gov't Br. 75). Whether the district judge intended to be unfair, of course, has no relevance as to the degree of prejudice suffered by the defendants which is the sole question here. *Hunter* v. *United States*, 62 F. (2d) 217, 220; *Williams* v. *United States*, 93 F. (2d) 685, 694. Moreover, neither petitioner nor this Court can read the trial judge's mind as of two years ago. It is the effect of his acts, not his intent, which governs here.

The errors in the conduct of the trial judge cited in petitioner's main brief, with the Government's replies thereto, may be considered in the following order:

1. *The trial judge erroneously admitted highly prejudicial hearsay reports, Exhibits 81A and 113 (Pet. Br. 37-42; Gov't Br. 63-67).*—The trial court's admission into evidence of the hearsay reports contained in Exhibits 81A and 113 is undoubtedly a most far-reaching error of the trial court. The Government admits that the reports of the Alcohol Tax Unit agents "contained the statements of persons who had given the investigators information connecting the accused with the stills" (Gov't Br. 65). That such statements are hearsay is undeniable since, within the classic definition, they derive their value, not from the credit to be given to the witness himself (the testifying agent) but on the veracity and competency of other persons, i.e. the persons who had given the statements to the agents. The hearsay rule rigidly excludes such statements, and there is not the slightest suggestion from the Government that they come within any recognized exception to the hearsay rule. *Hopt* v. *Utah*, 110 U. S. 574, 581; 1 Greenleaf, Evidence sec. 99.

The Government first asserts that the reports were admitted with the consent and agreement of Glasser's counsel (Gov't Br. 65). But the Government admits (Gov't Br. 65-66, n. 3), that Stewart, for a space measured by three pages of the record, argued (emphatically and cogently) that an Alcohol Tax Unit agent's statement of the results of an investigation, so far as it constituted merely his conclusions from what somebody else told him, would be inadmissible because it amounted to mere hearsay. And while Glasser, as a matter of law, could not have used such reports in submitting cases to grand juries, the jury in Glasser's trial would not know this (R. 445-448).[23] That the precise point was made to and recognized by the court, appears from the following (R. 448):

> Now, if Your Honor is just going to permit the Government to put a witness on who gives hearsay evience to establish Kaplan was the owner of the still, then shew the Grand Jury No Billed the case, and then Mr. Ward will argue to the jury that Mr. Glasser had a good case, the Jury does not know Mr. Campbell [the Alcohol Agent who made the report] wouldn't be permitted to testify, and all of this before the Court, if Kaplan were put on trial. That is my point.
>
> The Court: Well, I think in your examination of *your witnesses* you ought to ascertain just what evidence *they* had, and required, in reference to this still, and which was furnished to Mr. Glasser. (Emphasis supplied.)

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[23] The references in Stewart's argument to the example of Boguch (R. 447, 451) were to bring out the contrast betwen evidence available at Glasser's trial and the mere reports of Alcohol Tax investigators which alone and unsubstantiated may have been all that was available to Glasser at the time of his handling of the Alcohol Tax cases for the Government. Boguch, alias Ralph Sharp, had earlier testified that he informed no Government man as to his connection with the Western Avenue and Spring Grove stills until 1940 and the only grand jury to which he gave information as to his employer (Kaplan) was the grand jury investigating Glasser (R. 379, 377). Thus Glasser did not have available these later testimonial statements by Boguch.

Nevertheless, the Government relies on two statements of Stewart, both excised from a context which conclusively shows that he at all times vigorously asserted for his client the right to be tried on no hearsay evidence and the right to confront the witnesses against him. The first is Stewart's statement that the agent's report, Exhibit 81A, would sum up the information the agent had with relation to the still (R. 449). But this was obviously limited to facts of which the agent personally knew, as amply appears from Stewart's further statement at the next page of the record (R. 450):

> May I say this, Your Honor? Conversation with the Investigator, Mr. Campbell, would give Mr. Glasser about what Mr. Campbell learned, wouldn't do Mr. Glasser any good unless Mr. Campbell had witnesses that were available, that is the point.

The second statement by Stewart upon which the Government relies—that the investigator's report "would be better evidence than anything else as to what he reported" (R. 451)—is in no sense a waiver of the hearsay objection which had been again voiced by Stewart in the next prior sentence. However, if there could have then existed any doubt as to Stewart's position, it was conclusively removed by his objection immediately following the sentence on which the Government relies (R. 451):

> Your Honor, there is one more objection the tendency of the report, the report should be one he made, and he knows, for instance, he can't use a report that includes a lot of things he has no knowledge of.

It is thus apparent that the second statement on which the Government relies was merely an invocation by Stewart of the best evidence rule as to what the agent said in his report and of nothing more; and Stewart at the same time clearly reemphasized his objection to hearsay evidence whether oral or contained in a report which under the cir-

cumstances of this case was particularly prejudicial to Glasser. And, since the hearsay objection to such reports not only was obvious but had been specifically brought to the court's attention, it cannot reasonably be argued that Stewart was required to do more than to object as he did when these two reports were offered in evidence (R. 529, 532). The court had earlier ruled that all adverse rulings would be understood as carrying an exception (R. 185, 195). Nor can the subsequent admission of other similar reports, as the Government suggests (Gov't Br. 66), ameliorate the error in admission of these. Stewart deemed his objection and the court's ruling to be conclusive on all other similar reports (R. 185), i. e., if the objection did not lie here, it would not lie as to the other reports; on the other hand, if the admission of the reports was error, as he contended, it was error so plainly prejudicial as to require no reinforcement by continued objections to the other reports.

The Government's second contention, that these reports "were competent evidence" because they showed "what evidence of violations was furnished" and were therefore "directly relevant to the charge" (Gov't Br. 66) is in conflict with the basic principles underlying the hearsay rule as stated by this Court in *Mima Queen* v. *Hepburn*, 7 Cranch 290, 295:

> Hearsay evidence is incompetent to establish any specific fact which fact is in its nature susceptible of being proved by witnesses who speak from their own knowledge. * * * Its intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact, and the frauds which might be practiced under its cover, combine to support the rule that hearsay evidence is inadmissible.

It is plain that these reports could not have properly served, as the Government suggests, to make the jury "better able

to appraise Glasser's explanation of his conduct of the cases" (Gov't Br. 67) for they afforded but little indication of the evidence he had available. The premise for the Government's suggested assumption that consideration of these reports was, by instruction to the jury, limited to the question of notice is without merit because the fact that Glasser had received notice of the fact of these law violations was made to appear elsewhere (R. 528-529). Moreover, all of these reports, because they included statements of persons not before the court and so deprived petitioner of his right of confrontation and cross-examination, were hearsay, exceedingly prejudicial in character. Finally, because the jury could not know the rules as to the admissibility of evidence or know the distinctions between hearsay reports of agents and actually available testimony of witnesses or indeed know what were properly the duties of a prosecuting attorney under the circumstances, Glasser was particularly subject to prejudice by even the slightest error of the court which resulted in conveying a false impression to the jury.[24]

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[24] A further example of the callous indifference of the trial judge in permitting the introduction of inadmissible evidence is his action in permitting, over strenuous objection by all defendants (R. 450-451, 716), testimony as to statements made by Roth on two different occasions to Alexander Campbell, an assistant United States attorney at South Bend, Indiana (R. 680-689). Campbell testified that Roth in September 1938 came to see him about two defendants and attempted to bribe him so as to avoid their indictment if they had not already been indicted, saying, "Well, that is the way we handle cases in Chicago sometimes." (R. 680-682). Campbell also testified that in July, 1939, Roth told him of a pending investigation in Chicago by Special Alcohol Tax Investigator Bailey and asked if Campell couldn't talk to him and "pull him off this investigation" (R. 683-685).

These statements, even if admissible against Roth (as they were not in this case), were certainly not admissible against Glasser. The first statement was not admissible because it was not in furtherance of the conspiracy here charged. *Prettyman* v. *United States*, 180 Fed. 30, 44 (C. C. A. 6); *Minner* v. *United States*, 57 F. (2d) 506, 510 (C. C. A. 10); *United States* v. *McNamara*, 91 F. (2d) 986, 988-989 (C. C. A. 2); *United States* v. *Sprengel*, 103 F. (2d) 876, 881 (C. C. A. 3). Testimony

2. *Hostile cross-examination and prejudicial remarks of the trial judge deprived petitioner of an impartial trial.*—In effect, the Government seeks to justify the highly prejudicial remarks of the judge, made as they were under circumstances and in a manner plainly tending to the prejudice of petitioner, as mere "clarification" (Gov't Br. 72 note). In evaluating the prejudicial effect of these questions and remarks, regard must be had to the highly technical nature of the case and the fact that the lay jury had no knowledge concerning duties of an United States Attorney. The jurors must necessarily have been affected by any slightest intimation of the judge to a degree beyond that in an ordinary case where they could also be guided by their own personal knowledge.

(a) *Reiteration of ratio of no-bills to total of cases presented to grand juries (Petitioner's Br. 42-43; Gov't Br. 72, note 3).*—The Government's explanation that the judge merely sought to "clarify" the testimony of the witness Morgan disappears upon reference to the record, where the utter lack of necessity of this undue emphasis by reiteration is shown (R. 196):

> A. From an examination of the Sidney Eckstone Grand Jury records I can tell there were twelve no-bills returned in cases in which Glasser represented the Government. Glasser presented twenty cases to the Eckstone Grand Jury.
>
> The Court: That is the total number of cases presented?
>
> A. By Mr. Glasser.
>
> The Court: To this Grand Jury.
>
> A. Yes, sir.

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of the second was inadmissible also because it was made after Glasser left office (R. 912), and hence occurred after the termination of the alleged conspiracy. *Logan* v. *United States*, 144 U. S. 263, 309; *Brown* v. *United States*, 150 U. S. 93, 98; *Collenger* v. *United States*, 50 F. (2d) 345, 348 (C. C. A. 7). And the sole purpose and result of this testimony was to prejudice the defendants in the eyes of the jury.

The Court: And of the twenty there were twelve No Bills?

A. Yes, sir.

Nothing could be clearer than the original statement of the witness. It was manifestly unfair for the judge to take a perfectly clear sentence, break it into segments, and secure a re-emphasized statement as if it were a matter of such vast importance that the jury should not overlook it.

(b) *Judge's statement as to availability of Ritter as a witness (Pet. Br. 43-44; Gov't Br. 75, note ¶ 7(b)).*—It was Glasser's uncontradicted testimony that a case had been stricken from the docket at the request of Government Agent Ritter, who was available to the Government if it wished to call him to rebut Glasser's testimony. The Government did not do so, and hence there arose a legal and logical inference that his testimony, if given, would not aid the Government (see citations in Pet. Br. 43-44). But the judge, in open court and during the progress of the trial, told the jury that just the contrary was true (R. 920). Thus the comment of the judge was not only untimely and uncalled for but was contrary to law and, in the minds of the jury, deprived Glasser of the benefit of his own testimony. The Government merely denies the law and the fact (Gov't. Br. 75 note).

(c) *Testimonial statements as to Abosketes (Pet. Br. 44-46; Gov't Br. 74, n. 6).*—The evidence of the Government as to Nick Abosketes was offered plainly in the hope that the jury might be caused to make the erroneous inference that Glasser was in some way connected with payment of money by Abosketes to one Brantman (see Pet. Br. 44-45). The record clearly shows that, usurping the functions of the prosecutor, the judge called for and testified to two indictments of Abosketes; he then testified as a witness as to what these indictments showed; and his final testimonial

statement was plainly intended to impress the jury (R. 1030):

I happen to know something about Nick Abosketes.

In view of the fact that the judge was manifestly not subject to cross-examination, the inquiry of Glasser's counsel Stewart as to the disposition of the Wisconsin indictments and his meaningful statement that "we will accept your Honor's credibility" were the most he felt he could do in an attempt to protect his client's rights and tactfully call attention to the fact that the judge was testifying as a witness (R. 1030)—and the Government's present claim that this was "acquiescence" (Gov't Br. 74 note) is plainly specious. So also is the suggestion of the Government that this testimony of the judge merely "affected the credibility of Abosketes" (Gov't Br. 74 note). Judge Stone was in error when he stated in his testimonial question (R. 941) that at the time Glasser was seeking to get evidence against Abosketes (February, 1938; R. 647) there were pending indictments against Abosketes in the Eastern and Western Districts of Wisconsin (see Pet. Br. 44-45). Contained as it was in a question whether Glasser knew of these indictments (R. 941), this question was highly prejudicial since it gave the jury to understand that Glasser should have had knowledge of a non-existent fact. And as to both indictments, it led the jury to believe that this failure of investigation was chargeable to Glasser rather than to the Alcohol Tax Unit whose duty it was to investigate this and similar cases and report to Glasser (R. 898).

(d) *Rhetorical questions as to Glasser's judgment (Pet. Br. 46-47; Gov't Br. 76 note).*—Despite the Government's assertion to the contrary (Gov't Br. 76 note), the objectionable nature of the court's questions in their argumentative and critical aspects is apparent. While Glasser had testified only to his judgment in one case that certain sentences

should be reduced, the court's questions naturally misled the jury to assume that he was proposing, as the judge said, to turn them all "loose" immediately (R. 1022). Aside from the fact that it was plain error for the judge to thus express to the jury his view that Glasser's judgment and conduct was improper, the correctness of his implied conclusion is very doubtful. For it later eventuated that the indictment in the Eastern District of Wisconsin—to which the court referred and which was the only one in existence in February, 1938, the time of Glasser's criticized conduct (R. 941, 943)—had there been pending without action for more than two years since January 1936 (R. 1030) and hence, even if material to Glasser in his district, was apparently a case so poor that the Government did not press it.

To minimize this situation the Government insists that Glasser was not prejudiced because he explained his conduct by saying, "it was the judgment of myself, Judge Igoe and Mr. Herrick" (R. 1022)—but the Government overlooks entirely the fact that this explanation by Glasser was curtly stricken (R. 1023), thus emphasizing the prejudice.

(e) *Attempt to nullify testimony of Glasser's witness, Judge Igoe (Pet. Br. 47-49; Gov't Br. 73, note ¶ 5).*—The Government suggests that the judge by his interruptions and interference was "merely trying to refresh Judge Igoe's recollection and to reconcile his testimony with the earlier testimony of Bailey, as a course more tactful than subsequent rebuttal would have been" (Gov't Br. 7 n. ¶5). But the Government's attempted explanation is plainly without merit, for the trial judge could not properly interfere to "reconcile" Judge Igoe's testimony in order to sustain Agent Bailey's testimony. Moreover, the Government's explanation rests upon a carefully fostered assumption of a non-existent conflict of testimony.

After setting out the theory of the Glasser defense found in earlier testimony of Judge Igoe, the Government says (Gov't Br. 73 n. ¶5):

> Bailey, *however,* had previously testified that he had a conference with Judge Igoe and Glasser in January 1938 regarding the case the Alcohol Tax Unit was developing against the Hodorowicz gang and that he discussed the case with Glasser a number of times thereafter, and that his final report was not submitted to Glasser until April 1938 (R. 706-708). (Emphasis supplied)

But this statement is wholly unfounded because: careful examination of the Government's narration of the prior testimonial statements of Bailey and of Igoe (Gov't Br. 73-74) will show that, until the intrusion of the presiding judge, there had developed no conflict between them. Judge Igoe had testified that the Bailey report, Exhibit No. 160, dated April 21, 1938, had been brought to his office one day by Bailey and Glasser; that he had then stated to Glasser that this voluminous report indicated the agents were going after minor violators rather than the "real offenders"; that if, after Glasser examined it, it showed a real case against the Hodorowicz brothers, they would be prosecuted; that Glasser examined and recommended prosecution of the Hodorowicz brothers on substantive counts rather than a conspiracy count carrying only a two year sentence; and that he, Igoe, approved (R. 891-892). Bailey, as the Government says (Gov't Br. 73), had merely testified that he had had a conference with Glasser and Igoe in the early part of 1938 and that after numerous subsequent conferences he had made his report dated April 21, 1938 and brought it to Glasser on that day (R. 706-708). Thus, contrary to the impression the Government seeks to convey, at the time of the interruption there was no testimony of Bailey to negative Igoe's testimony to the fact that he had seen the report

and to the fact that it was brought to him by Glasser and Bailey.

Despite Igoe's positive testimony that he had seen the report, the court averred that he "wondered," "was just wondering," and again "wondered" whether Igoe had seen it (R. 892). Then, in the passage of which petitioner complains, without leaving it to the prosecutor to produce witnesses in rebuttal after Igoe should have completed his testimony and although the question of dates was not presently pending—the court stopped the cross-examination, assumed the role of an advocate and, as the presiding judge, (1) emphasized Bailey's prior testimony as though it negatived Igoe's testimony as to their conference concerning the report, (2) obtained Bailey's statement that he did not have the report with him at the conference with Judge Igoe and Glasser; and then (3), because of this mere denial by Bailey, that he had personally brought the report to Glasser and Igoe, the judge drew, and stated to the jury, the utterly unfounded further inference that Igoe had never seen the report. In effect he thus destroyed the benefit of all of Igoe's prior testimony that he had seen the Bailey report and had approved Glasser's action thereon—all this without the slightest foundation.

Even were there danger of "untactful" rebuttal of Igoe imminent, as the Government now conjures though there is no showing that it was, the decision as to whether he should be allowed to persist in his story and run the risk of such rebuttal was not for the presiding judge to decide. The judge was not the prosecutor trying the case; or at least he should not have been. The action of the judge not only destroyed the benefit of the prior testimony of Judge Igoe but necessarily impaired in the minds of the jury the credibility of all his subsequent testimony. Judge Igoe was obviously one of Glasser's most important witnesses. To condone this action of the judge would be to impair sub-

stantially the right to a fair trial. The serious prejudice to petitioner is obvious.

(f) *Wilful misrepresentation as to duty of petitioner (Pet. Br. 49-52; Gov't Br. 70-71, note 3, ¶ 1 and 2).*—The Government's suggestion that the phrase "dropped out of mid-air" used by the judge with reference to one of Glasser's cases (R. 232) is mere idiom ignores the connotation of the idiom—that there was some unexplained quality about the occurrence. It was intended to suggest to the jury that there was some mysterious and ulterior cause for the fact that the defendants had not paid a fine. Yet only a few seconds earlier Ward, the prosecuting attorney, had clearly stated that the questioning was as to a mere arraignment for taking pleas (R. 231-232). The further suggestion by the Government that it was mere interrogation "as to the disposition of the case" (Gov't Br. 70 note) will not stand in view of the fact that the witness had just testified that "I never heard any more about the case". Certainly, there was nothing left to clarify and the judge may not, in the guise of clarification, by adroit verbiage thus create in the minds of the jury unjustified inferences of guilt.

To explain the same sort of judicial cross-examination of Anthony Hodorowicz respecting Glasser's handling of an arraignment, the Government says it was "based upon a mistaken assumption of the nature of the appearance" (Gov't Br. 71, note).[25] After the witness had testified that the facts were not brought out before Judge Woodward and that the defendants were called before the judge "just to mention our names" (R. 347-348), to assert that any fed-

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[25] Conceding error, the Government contends this was not prejudicial, apparently because "the main fact in the Stony Island Avenue case was that it was stricken from the docket" (Gov't Br. 71-72). Plainly fallacious is the basic assumption that the jury could appreciate any such "main" object of the Government and disassociate the inevitable inference here created.

eral judge would not at once know that such occurrence could not have been a trial is to strain credulity. Moreover, the court did not stop with a single such rhetorical question, but embarked on a whole course of questions to reemphasize the point and ended with the following conclusion (R. 348):

> So you don't know,—your recollection is that there was not a complete disclosure of all the facts that connected you with that case, before the Judge.

The use of the phrase "not a complete disclosure" shows that this was an argumentative summarization rather than any attempt to obtain clarifying statements from the witness. No jury, from this line of questioning, could gather other than that Glasser had been guilty of breach of his duty in handling this matter—which was a mere arraignment and obviously handled quite properly by Glasser. The question of what was proper conduct by Glasser on such occasions was obviously a technical one with regard to which the slightest indication of the attitude of the supposedly informed judge must necessarily have had peculiarly weighty effect with the jury.

It is important to note, therefore, that this questioning as to the arraignment is not the sole instance where the same sort of innuendo as to misfeasance by Glasser on such occasions resulted from questioning by the judge which ignored the obvious situation. Another example is afforded by the cross-examination of Roth by McGreal (R. 873). There it had just been stated, not by the witness but by the prosecutor, that the libel case against the Chrysler car of Rose Vitale had been tried on statement. This had been affirmed by the witness who stated, "Mr. Glasser made the opening statement, read the report and submitted it to Judge Barnes." Judge Barnes had earlier explained in detail that this case was tried on the statement and that under these circumstances cases are heard without actual

testimony. He had also testified to the fact of frequent use of such procedure (R. 717-718). Despite this clear description of the situation and the earlier explanation, as to which there could be no possible misapprehension by any lawyer, the judge asked (R. 873):

> Was any witness sworn or testimony taken?

But since the case was tried on the statement, there was no occasion for witnesses or testimony.

From the judge's inquiries in each of these two instances, the only result possible was to create in the minds of the jurors the definite but unfounded impression that the absence of questions in the first, and the absence of witnesses in the second were indicative of wrongful conduct on the part of Glasser.

(g) *Hostile questioning of petitioner in connection with the Vitale libel case (Pet. Br. 52; Gov't Br. 76-77 note).*—The Government purports to explain the hostile cross-examination of Glasser as to his presentation of the Chrysler sedan libel case (R. 1000-1001) on the ground that "in his examination the court simply sought to ascertain Glasser's reasons for not bringing to Judge Barnes' attention the information he had of Leo Vitale's bootlegging activities" (Gov't Br. 77 note). But Judge Barnes already knew these facts when the case was tried before him (R. 717) and it was not Leo Vitale himself but Rose Vitale who was before Judge Barnes on that occasion.

(h) *Hypothetical question without foundation in the record. (Pet. Br. 53-54; Gov't Br. 77-78 note).*—In evaluating the Government's defense of the judge's damaging hypothetical question in the Chrysler sedan libel case, regard must be had to its wording (R. 1001-1002), which was:

> Isn't it a fact, Mr. Glasser, if an automobile is found on the premises where there is also found an unregis-

tered still, that if it is found within the enclosure, and you have got evidence which can establish that the particular automobile found within the enclosure of the unregistered still, was on numerous occasions followed by the Alcohol Tax Unit, and observed and seen cans of alcohol being placed in it, and license number changed on it, and traced to the premises where the still is actually found, do you consider that fairly good evidence that the automobile was being used to defraud the United States Government out of the taxes on alcohol?

The unfounded assumptions of the question, which required Glasser to answer in the affirmative and which were assumptions of fact not in evidence, were that cans of alcohol had been seen being placed in the car and license numbers changed on it. The Government's partial reliance on Exhibit 36 as supplying these facts is absurd since it was read to Judge Barnes who testified that on this report the car was not in the place where the still was, i. e. the enclosure, and that the libel was required to be dismissed for that very reason among others (R. 717-718).

The Government also relies on a paper not in evidence, to supply these facts. It refers to a criminal case report allegedly made by Dowd, quoting directly and indirectly from it in an effort to sustain the facts assumed by the judge. It concludes with the statement that this report was part of a file "introduced as exhibit 210 and it is on file here" (Gov't Br. 77-78 note). Thus, the Government takes direct issue with petitioner's assertion that this criminal file was not in evidence (Pet. Br. 54) but notably fails to show by citation to the bill of exceptions where "Exhibit 210" was introduced. A most careful scrutiny of the bill of exceptions discloses that it was in fact never offered in evidence. Clearly, it will not do to rely on the fact that the clerks of the courts below forwarded these papers so that they are on file here; and of no more avail is the certificate of the clerk of the district court (R. 1075, 1088). The fact

that the clerk erroneously certified Exhibit 210 is traceable to the circumstance that the Government retained all exhibits and then sent them to the clerk with a receipt including a list which he apparently accepted without checking against the bill of exceptions (see Pet. Br. 55-57). For, in the interest of accuracy, the law is well-established and the strict rule is that this Court will ignore papers not made a part of the bill of exceptions duly certified by the judge, *Bank* v. *Kennedy*, 17 Wall. 19, 29; *Reed* v. *Gardner*, 17 Wall. 409, 411; see *Hanna* v. *Maas*, 122 U. S. 24, 26, either by incorporation in the body of the bill or by reference. *Jones* v. *Buckell*, 104 U. S. 554, 556. When incorporated by reference, the paper must be marked by means of identification mentioned in the bill of exceptions. *Leftwitch* v. *Lecanu*, 4 Wall. 187, 189; *Krauss Bros. Co.* v. *Mellon*, 276 U. S. 386, 393-394. And certification or forwarding of papers by the clerk can add nothing to the bill of exceptions. *Lessor of Fisher* v. *Cockerell*, 5 Pet. 248, 254; *Buessel* v. *United States*, 258 Fed. 811, 816-817; *King* v. *United States*, 1 F. (2d) 931; *Lau Lee* v. *United States*, 67 F. (2d) 156, 158; see *Hanna* v. *Maas*, 122 U. S. 24, 26.[26] It thus conclusively appears that, while this criminal file was ostentatiously handed to Glasser with the obvious effect of conveying to the jury the impression that it contained a report sustaining the hypothetical question, and although handing it to the judge necessarily made the same impression on the jury (R. 1002), the prosecution never even attempted to offer it in evidence and thus avoided scrutiny or question of its competence and admissibility by petitioner. Compounding the prejudice and wrong to petitioner, the Government in this Court, after its

[26] The judge's certificate to the bill of exceptions states that it includes "all evidence adduced at said trial" (R. 1069), and it was ordered that all the original physical exhibits introduced be by reference incorporated in and made a part of the bill of exceptions (R. 1092). There is no question, therefore, but that this Court may consider the sufficiency of the evidence.

attention has been called to this fact (Pet. Br. 54), nevertheless persists in its utterly unsupported statement that this file as part of "Exhibit 210" was introduced in evidence. But, even "Exhibit 210" does not supply these facts, as a perusal of the Government's own statement (Gov't Br. 77-78 note) discloses and as examination of the so-called exhibit will also disclose.

Conclusion.—The efforts of the United States to minimize the misconduct of the trial judge are obviously not well taken. They ignore the record; they strain the evidence; and they are based upon unfounded assumptions. Moreover, it is well-recognized that, where a case against a defendant is weak, even slight judicial error necessarily results in prejudice and requires reversal. "In these circumstances, prejudice to the case of the accused is so highly probable that we are not justified in assuming its non-existence." *Berger* v. *United States,* 295 U. S. 78, 89-90. "The greater the doubt of guilt, the more likely that prejudice results from errors in the trial." *Gold* v. *United States,* 26 F. (2d) 185, 186 (C. C. A. 2). Even where "there is a substantial conflict in the evidence" the rule is applied, *Adler* v. *United States,* 182 Fed. 464, 473 (C. C. A. 5); *Williams* v. *United States,* 93 F. (2d) 685, 692 (C. C. A. 9); and here even the Government concedes that the evidence "was sharply conflicting" (Gov't Br. 32). The conduct of the presiding trial judge in this case plainly requires reversal of the judgment against Glasser.

VIII.

The improper conduct of the prosecuting attorney violated the right of petitioner to a fair and impartial trial

(Pet. Br. 54-72; Gov't Br. 81-97).

1. *During the trial the prosecuting attorney wrongfully deprived petitioner of his right to examine exhibits intro-*

duced or marked for identification (Pet. Br. 55; Gov't Br. 89-90).—In the course of cross-examination of the petitioner, he was questioned as to some 20 of the thousands of cases handled by him during his tenure. The prosecuting attorney, in conducting the cross-examination, relied upon and referred to the files in these several cases without permitting petitioner to examine them. These files had either been admitted in evidence or marked for identification and, therefore, should have been in the custody of the clerk so as to provide opportunity for examination by either side. The failure of the prosecuting attorney to so deposit them was a clear violation of Rule 16 of the District Court. See Pet. Br. 55.

Because Glasser was forced repeatedly to answer the prosecuting attorney's questions with a statement that he did not know, the latter in open court offered to "hand him any file here that he wants to look at, so he can look at it and be prepared for the examination" (R. 979). Thereupon the court ordered: "We will suspend now, until Monday morning at ten o'clock. In the meantime you may have access to those files" (R. 980).

Accordingly, on Saturday morning Glasser went to the office of the United States attorney where the files were, and McGreal, the assistant prosecutor, refused him access to the files. When, after the week-end, the prosecutor Ward renewed his practice of questioning Glasser and commenting on Glasser's statements that he did not recall the cases, Glasser called attention to the fact that he had been denied access to the files (R. 982). The prosecutor McGreal stated to the court that he had informed Glasser through a clerk that he would not see him alone and suggested that he get his lawyer (R. 982)—although Glasser only had Saturday or Sunday, his lawyer presumably could not be summoned on any moment's notice, and the United States Attorney's of-

fice is closed Saturday afternoons and Sundays.[27] Thereupon the court stated (R. 983):

> They simply told you to get your lawyer, and you didn't get your lawyer so the responsibility is not upon them. Show him the reports now.

Thus, the prosecutors, by breaching the fixed rule of the court requiring custody of exhibits by the clerk, were enabled to comment in the presence of the jury that Glasser kept answering he did not recall specific cases. They were also enabled to exhibit an appearance of generosity before the jury by stating they would show the files to Glasser over the weekend. And on the following Monday they were again enabled by their obviously specious excuse to obtain the judge's criticism of Glasser, making him appear negligent for failure to produce his lawyer.

The Government, apparently adopts this excuse of the prosecutors as sufficient and here argues: (1) that the prosecutors were merely "impolite and unfriendly" and their acts "not * * * prejudicial"; and (2) that Glasser was not placed at a disadvantage, because files or reports "were handed to him from time to time as the prosecutor questioned him regarding various cases" (see, e. g., R. 983, 996-999, 1006, 1008). But Glasser had an unconditional right to examine all exhibits whether introduced in evidence or marked for identification; denial resulted in his giving the appearance of a reticent witness before the jury; and the result was not only wrongful but prejudicial in a degree not easily minimized. The prosecutor's excuse for failure to comply with the court's order for access—that he "wouldn't see him [Glasser] alone under any circum-

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[27] In view of the fact that this demand was made at 10:30 A. M. on Saturday, a half day (R. 982-983), it was obvious that the delay incident to obtaining the presence of Stewart would have so materially shortened the time remaining for examination of the files as to make the right of access valueless.

stances'' (R. 983)—was obviously irrelevant and entitled to no consideration. For Glasser was not there to see McGreal; he was there to examine the files and McGreal's presence was in no way essential; and, indeed, Glasser did not ask to see McGreal but Ward (R. 982). Neither was the presence of Glasser's lawyer essential. Had McGreal deemed supervision of Glasser's examination desirable that could have been provided by a clerk without the presence of McGreal; and it was Glasser's recollection that was to be refreshed, not his lawyer's.

The suggestion that Glasser suffered no disadvantage because the files were handed him as he was questioned is, of course, frivolous.[28] The prejudice to Glasser is apparent in the cross-examination relating to the Workman case. Prior to the week-end recess, Glasser had indicated his inability to answer the questions of the prosecutor without having had opportunity to examine the files in the case (R. 975, 977, 979). Immediately after the recess, he was again compelled, by reason of the arbitrary action of the prosecutor, to state that he did not know how large the distillery was (R. 981, 982) although the files of the prosecutor included many papers relating to this still some of which would have disclosed its size and had already been marked for identification (Exhibits No. 1, R. 193; No. 4, R. 194; No. 5, R. 194; No. 7, R. 197; Nos. 8-18, R. 198; Nos. 20-34, R.

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[28] Of the three examples cited by the Government to show that this practice resulted in no prejudice, "(R. 983, 996-999, 1006, 1008)," the first is a mere docket sheet. The second citation is to the agent's reports concerning activities of one Leo Vitale. While Glasser was able from cursory examination to state what appeared on the first page of each file (R. 997, 998), when he was asked whether a certain individual, Barney Cloonan, was the agent (R. 999) his interrogatory answer indicates that he was unable to determine who had written the report from the opportunity for cursory examination thus afforded. The remaining examples cited by the Government, (R. 1006, 1008), merely show instances of Glasser's ability to make answers from a glance at the papers involved.

211).[29] It may be noted, also, that the size of the still was not inherently important; and the questions were seemingly directed to obtaining statements from Glasser that he didn't recall the facts, thus raising in the jury's mind at least a doubt of Glasser's credibility.

With regard to the Zarrattini case, Glasser before the recess, had shown that he had not the slightest recollection of it (R. 957). After the recess, Glasser having still been denied access to the files, he was again forced to say that: "I don't remember the Albina Zarrattini case. * * * I don't know. I have no recollection" (R. 987). The same course of conduct was adopted by the prosecutor in his questioning as to the Kwiatowski case; initially, Glasser stated he did not remember the Kwiatowski case (R. 961-962); after the recess, the prosecutor's questions again forced Glasser to answer (R. 986): "I don't remember the Kwiatowski case."

Even more plain was the prejudice to Glasser in refusing to permit him access to the file on the Spring Grove case. As to this, he had to answer: "I don't remember the Spring Grove case" (R. 970) and make repeated statements to the effect that he did not know or did not remember. Indeed,

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[29] Although these papers are certified here by the clerk as exhibits (R. 1075-1077), they are nowhere shown in the bill of exceptions to have been introduced in evidence. Indeed, a rigid scrutiny of the record in this case has disclosed that, of the 217 exhibits certified by the clerk, only 107 are shown by the bill of exceptions to have been introduced in evidence. It also discloses that some 23 exhibits introduced in evidence were omitted from the clerk's certificate.

The Government suggests that it does not appear that the files to which access was denied were ever introduced in evidence (Gov't Br. 90, n. 11). But even if this be conceded, the prosecutor's action in withholding the files from the custody of the clerk is still not justified for Rule 16 of the district court provides that papers when "marked for identification" shall be placed in the clerk's custody. And of course, the fact that they had not been introduced in evidence would in no way excuse the prosecutor's failure to comply with the order of the judge, particularly where it furnished a basis for further prejudicing petitioner in the eyes of the jury.

he pointed out that the prosecutor had the report before him while Glasser had to testify from memory (R. 971). This report had previously been admitted in evidence as Exhibit 113 (R. 532). The prosecutor stated this exhibit was 75 to 80 pages long (R. 540). Yet Glasser was never given adequate opportunity to examine it. Also, in the cross-examination of Glasser concerning the Western Avenue still case (R. 967, 969), Glasser plainly had great difficulty in testifying because he had not been given access to the report of the agent in that case (Exhibit 81A, introduced R. 529).

The damage to Glasser was immeasurably increased of course when, after the ostensible generosity of Ward in offering access to the files (R. 979) to which Glasser was entitled as a matter of right, the Judge in the presence of the jury charged *Glasser* with responsibility for the arbitrary denial of access to the files, on the ground that he did not have his attorney with him (R. 983).

In spite of this conduct of the prosecutor, the Government, in discussing the sufficiency of the evidence, now has the effrontery to assert in this court that Glasser's "credibility was seriously impaired by his uncertain testimony on cross-examination and by his self-contradictions" (Gov't Br. 31, note 20).

2. *After the verdict, the prosecutor removed from the office of the Clerk and lost exhibits deposited with the Clerk forming part of the record in this case* (*Pet. Br. 55-56; Gov't Br. 94-95*).—Petitioner's main brief points out that the record shows, and the Government does not now deny, that the prosecutor without the consent of petitioner, took the exhibits in the case from the custody of the clerk at the close of the trial and, without the knowledge of petitioner, retained them for almost five months until they were de-

manded by the clerk of the circuit court of appeals.[30] During this period some of the exhibits were lost, or at least they were never returned by the United States Attorney's office. The Government now seeks to excuse the failure of the United States attorney to return certain of defendant's exhibits in the case, particularly Exhibits Nos. 205 and 206 (introduced, R. 953) by relying on the prosecutor's bald assertion that he did not receive them, and on the further answer, also advanced below, that the original stenographer's transcript did not show that these were offered and received in evidence. It would be preposterous to hold for a moment that the prosecutor, having taken the exhibits and having wrongfully withheld them for a period of five months, may now return such as he deems best or is able to return and blandly state that he never obtained the others. The Government's only other answer is that the original stenographic transcript does not show that the missing exhibits were introduced in evidence (Gov't Br. 95); but what the original stenographic transcript of the testimony showed was, of course, unimportant because the prosecutor approved the bill of exceptions which, being signed by the judge (R. 1069) imports absolute verity, and shows introduction of Exhibits 205 and 206 (R. 953, 1068). There has been a plain violation of Glasser's right to have preserved all the evidence taken at the trial.

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[30] The Government now seeks to excuse this conduct by reference to the fact that another defendant, Roth, consented to the Government's taking "the Exhibits for the purpose of making a list of the same" (R. 1094), and by assertion that "there was no objection either at the time or thereafter to the prosecutor's retaining the exhibits" (Gov't Br. 94). But these arguments have no merit. The consent of Roth could not bind Glasser. Furthermore, even this consent was limited to the short period necessary for "making a list" of the exhibits (R. 1094, 1096, Gov't Br. 94). Implied consent by Glasser may not be based on his failure to make objection for he did not even know that the exhibits, in breach of the rule of the court (Rule 16), had been retained in the custody of the United States attorney. Furthermore, the prosecutor may not excuse his breach of the rule on the ground that no one objected.

3. *After trial, prosecutor McGreal unlawfully mutilated exhibits constituting a part of the record in this case (Pet. Br. 57-60; Gov't Br. 95-97).*—The Government admits that the prosecutor improperly made additions to an exhibit after the trial.

The Government's defense of this conduct is the assertion that, in thus calling attention to a plain violation of duty by a judicial officer, the *petitioner* is guilty of "a reflection upon the intelligence and judicial integrity of the court below" (R. 96). With equal validity, the Government might here accuse petitioner of reflecting upon the judicial integrity of this Court in calling attention to the fact that "Exhibit No. 210" is neither included in or mentioned in the bill of exceptions although heavily relied upon by the Government, and by it asserted to have been introduced in evidence (Gov't Br. 78 note), *supra*, p. 65.

The attempt of the Government to show that some of the facts shown by McGreal's post-trial additions were brought out in the trial because as McGreal well knew in emphasizing it, the important point was, not whether Kaplan had been indicted, but that he "Pleads Guilty" (Exhibit No. 130), a fact nowhere in evidence because it did not occur until after the trial.

4. *Prosecutor Ward, by his leading questions, assumed the role of a witness (Pet Br. 60-63; Gov't Br. 81-82, note 3).*—To illustrate the flagrant nature of the prosecutor's violation of the rule against leading questions on direct examination, petitioner has pointed out in the main brief (Pet. Br. 60-63) an instance where the testimonial form of the prosecutor's question served as the sole link to connect petitioner with the alleged payment of money to Kretske for the purpose of "fixing" the Stony Island Avenue still case. The Government contends, and defends on the ground, that the record shows that the "questions were propounded to refresh Swanson's recollection" (Gov't Br.

82 n. 3). This apparently refers to the context of the question (R. 230):

> Mr. Ward: Q. Would it refresh your recollection if I was to tell you that Kretske said "Don't worry about a thing. Everything will be taken care of."
>
> A. Yes, that was said.
>
> Q. And Dan was to get part of the money that was given him?
>
> A. Well, I don't know if he said Dan or Red, or something like that, either one.

There is thus not the slightest hint of a reference to earlier memorandum or testimony by which to refresh. Plainly the mere use of the phrase "refresh your recollection" cannot justify a procedure by which the unsworn prosecutor testifies by using as a sounding board a confessed law violator (R. 225, 232). The result would be to set at naught the elementary principles of judicial evidence. Admittedly, the court has a wide discretion in permitting leading questions, but here the repeated indulgence of the prosecutor in putting leading questions to his own witnesses—questions which made clear the answer desired—was manifestly unfair to petitioner. And this was particularly true here where the questions were being put to his own witnesses who were not only friendly but were under the severest sort of pressure to answer favorably.[31] Such conduct by a prosecutor so violates his duty to see that persons are not deprived of their liberty in an unfair manner that reversal is required.[32] *Nurnberger* v. *United States*, 156 Fed. 721, 734-735.

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[31] Practically every one of the witnesses for the Government was either under sentence, or indictment for violations of the alcohol tax laws and therefore peculiarly subject to the slightest suggestion from the prosecutors. Swanson admitted that he expected to gain lenience for his confessed part in the Stony Island still case (R. 239) and that he would rather commit a little perjury than go to the penitentiary (R. 235).

[32] Petitioner's argument as to the importance of this error does not, as the Government asserts (Br. 82 note 3), ignore the evidence that $500 was paid to Kretske. The Government has yet to show that Glasser con-

For the Government to urge the omission of objection to Ward's leading question is to require the doing of a vain thing in the light of the court's reaction to the same objection made but a moment before (R. 229) and to the objection of attorney Balaban a minute earlier in the examination of the same witness (R. 227). It was apparent to all that the court was going to let Ward put whatever he desired into the mouth of his own witness. The uselessness of such objections, once the leading question is asked, is apparent from the passage at R. 245. The continuing practice of Ward in putting precise words in his witnesses' mouths appears at R. 301, 303, and R. 380.[33] The judge gave his full approval to the "refreshment of recollection" subterfuge (R. 703).

5. *The prosecuting attorney read to the jury only part of the testimony of a witness before the grand jury, deliberately leaving the jury to infer, contrary to fact, that this was the only testimony given by the witness (Pet. Br. 63-66; Gov't Br. 87-88).*—Petitioner's main brief has pointed out the oral testimony showing that Glasser in his presentation to the grand jury of the available evidence in the Spring Grove case did not repress Government witness Cole, whom he believed to be mentally unsound. And it was there pointed out that the prosecuting attorney read to the jury in this case a small and irrelevant portion of Cole's testi-

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spired with Kretske or that there was a conspiracy for the purpose alleged in the indictment. As we have shown above, Glasser struck the case from the docket at the request of an Alcohol Tax Unit agent. Neither to be lightly overlooked is the fact that Swanson himself testified that, although he had confessed his guilt in the case at least four months before, Ward had not yet reinstated the case (R. 236, 238). And Ward, Glasser's successor, had at the time of Glasser's trial failed for 11 months to proceed to trial on the evidence which the Government's whole argument assumes was sufficient and available to Glasser.

[33] Although mentioned at R. 290 and forwarded by the clerk as Exhibit No. 68 (R. 1079), the commissioner's file, from which the prosecutor purported to state his question, was never offered or accepted in evidence.

mony, relating to Cole's illness, from a paper purporting to be "the transcript of testimony taken before the grand jury on May 17, 1938" and identified as Exhibit 96 (R. 186, 574-575). Oral testimony of the Government's own witnesses, including Cole, indicates that Cole was examined at least twice before the grand jury and that he did testify as to the facts in the Spring Grove case. See Pet. Br. 64. Dropping all argument based on oral testimony found in the record, the Government now relies on "Exhibits" 95 and 96 as showing that the Spring Grove case was presented at one session on May 17 and that "Exhibit 96," the paper from which Ward read (R. 574), shows on its face that it is "a complete transcript of *all* the testimony of *all* the witnesses called before the [grand] jury in the • • • Spring Grove case" (Gov't Br. 88-89). There are two flaws in this line of argument. First, the unauthenticated "Exhibit" 96 merely bears the heading:

> Proceedings had and testimony offered before the Federal Grand Jury sitting in the Grand Jury Room, United States Court House, at Chicago, Illinois, 2:00 P. M., Tuesday, May 17, 1938.

Thus, while "Exhibit 96" admittedly contains the testimony of each of 10 witnesses, it fails to negative the testimony of the Government's own witnesses, that Cole testified at least twice and testified as to the facts of the Spring Grove case. Certainly this "Exhibit" falls far short of showing on its face, as the Government asserts, that it is "a complete transcript of all the testimony of all the witnesses called before the jury in the • • • Spring Grove case" (Gov't Br. 88-89). Secondly, "Exhibit 95," the minutes of the May, 1938, grand jury, in part relied on by the Government to support its interpretation of "Exhibit 96" (Gov't Br. 89 n. 9), is not part of the record in this case. Although several times referred to (R. 528, 591, 971) and

although certified as an exhibit by the clerk (R. 1080) the bill of exceptions fails to show that it was ever introduced in evidence.[34] Furthermore, even if this Court were to consider it, "Exhibit 95" fails to negative that all or some of the witnesses did, as shown by the Government's oral testimony, give additional statements to the grand jury on the same day or, indeed, on the same afternoon. Thus it cannot be denied that the prosecutor misled the jury by purporting to read all of the relevant portions of a document, "Exhibit 96", which was not complete although its completeness was the very point in issue.

6. *The prosecutor persisted in the putting of specious questions and damaging innuendoes.*—Petitioner rests upon his main brief in the matter of the questions, innuendoes, and fallacious statements made by the prosecutor. One item will suffice here. The prosecutor's statement as of personal knowledge that Glasser knew persons accused of various law violations was highly prejudicial and reversible error. See Pet. Br. 67-68; Gov't Br. 84. In cross-examining Judge Igoe, Prosecutor Ward asked whether he knew certain individuals and then flatly stated (R. 908):

> That is the point. I say you don't know them, but Mr. Glasser does know them.

Counsel for the Government "concede that it was improper but in the light of the circumstances under which it was

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[34] As a result of petitioner's scrutiny of the record, it must now be conceded by petitioner that "Exhibit 96" as well is not shown by the bill of exceptions to have been introduced in evidence, although identified and referred to (R. 529, 574-575). Petitioner must therefore concede that, contrary to the assumption contained in petitioner's main brief (p. 66), this purported transcript of the testimony before the grand jury cannot be conclusively presumed to have been submitted to the jury on Glasser's trial. However, the fact that it was read to the jury appears from the bill of exceptions (R. 574) and since it is properly identified, it may be considered by this Court in determining the question of the propriety of the prosecutor's conduct in reading it as though it were a complete transcript of the proceedings in the case.

uttered we do not think it was of such a serious nature as to constitute reversible error" (Gov't Br. 85). The circumstances are best understood by reference to the record showing of the character of these individuals whom Glasser was thus accused of knowing. They were the following, whom the prosecutor had just named (R. 907):

1. Elmer Swanson, who was a confessed participant in the operation of at least two different stills (R. 225, 227) and who had testified to paying money to Horton, and Kretske (R. 225-226, 229, 231).

2. Clem Dowiat, nephew of Frank Hodorowicz, arrested for alcohol tax law violation in June, 1937 and dismissed (R. 269-270), on September 1, 1937, in connection with the 118th Street still and discharged (R. 270-271) on December 31, 1937, and indicted and convicted in another case (R. 272, 275, 276).

3. Kamarek (Kazmicerczski?) was apparently claimed by the Government to be an associate of Clem Dowiat (R. 269).

4. H. L. Welch, alias John Pope, alias Yarrio, alias Sheenie Alberts had been arrested and indicted with William Workman in connection with the operation of a still (R. 194, 210-211) and his case was dismissed for want of prosecution on April 1, 1936 (R. 195), because the witnesses could not identify him (R. 979).

In view of the records of these men, the flat and emphatic statement of the prosecutor that, of his own knowledge, Glasser knew these men was thus unavoidably of a highly prejudicial nature. But the court forbore to rule on the motion of Glasser's counsel to strike the statement from the record. The Government attempts to confuse the issue here by alluding to the delicate situation which the prosecutor thus created by his offensive questioning of Judge Igoe, and by citing the diplomacy of the trial judge who, as a matter of fact, first attempted to defend Ward's questioning (R. 908). The record is clear that Glasser was deprived of the

basic right of confrontation of witnesses in permitting the unsworn prosecutor to brashly testify as of his own knowledge. None of the circumstances suggested by the Government ameliorate in any way the serious character of the consequent prejudice to Glasser. The rule is uniform that a defendant may not be subjected to a trial on the unsworn statements of an attorney conducting the prosecution, even when such statements are relevant to the case for he would by this procedure be deprived of the right of cross-examination and be also deprived of the right of giving evidence in rebuttal. *Berger* v. *United States*, 295 U. S. 78, 87-89; *Lowdon* v. *United States*, 149 Fed. 673, 677; *Taliaferro* v. *United States*, 47 F. 2d 699, 702.

7. *The prosecutor surreptitiously caused to be submitted to the jury prejudicial pre-trial statements corroborative of the testimony of Government witnesses* (*Pet. Br. 69-72; Gov't Br. 91-93*).—Petitioner in his main brief pointed out that a pre-trial corroborative statement by Government witness Raubunas dated October 20, 1939 (R. 482, 518), was offered in evidence as Exhibit 92 and objection thereto sustained (R. 712). This the Government now concedes (Gov't Br. 91-92). But the bill of exceptions conclusively shows that this exhibit was nevertheless surreptitiously included by the prosecutor in a group of 33 exhibits submitted by the Government at the close of defendant's case and made a part of the record (R. 1034). This pre-trial statement thus sent to the jury was highly prejudicial to petitioner because it is corroborative of the oral testimony of the witness, which included statements that the witness had seen Glasser with Kretske and Kaplan (R. 457-462).

Exhibit 92 was not included by the prosecutor in the exhibits which he returned to the clerk after retaining them for five months subsequent to the trial, and the clerk did not include it in his certificate (R. 1075). However, petitioner persisted in his assertion that this was an exhibit

introduced in evidence (R. 1098) and the prosecutor finally delivered Exhibit 92 to the clerk of the circuit court of appeals (R. 1100). The circuit court of appeals held that despite this clear showing of the bill of exceptions, it could not say that this exhibit was sent to the jury (R. 1132). And the Government continues to rely on the absence of Exhibit 92 from the list of exhibits certified by the clerk and asserts: "In view of the ambiguity of the record, we think the court below was correct" (Gov't Br. 92). But, in the first place, the clerk of the district court undertook to certify only "certain original Exhibits" (R. 1075) and therefore in no way contradicted the bill of exceptions (R. 1034). Moreover, an elementary rule prevents the assertion of any such "ambiguity" of the record. The bill of exceptions, approved by both the parties and signed by the court (R. 1068-1069), imports absolute verity and controls and determines conclusively what evidence was submitted to the jury. The certifications by the clerk can neither add to or subtract from the contents of the bill of exceptions and what is shown by it. *Lessor of Fisher* v. *Cockerell*, 5 Pet. 248, 254; *Chaffee* v. *Boston Belting Company*, 22 How. 217, 222; *In re M'Call*, 145 Fed. 898, 902; *Moss* v. *Gulf Compress Co.*, 202 Fed. 657, 659; *Buessel* v. *United States*, 258 Fed. 811, 816-817; *King* v. *United States*, 1 F. (2d) 931; *Lau Lee* v. *United States*, 67 F. (2d) 156, 158. Here the bill of exceptions shows that after having been denied admission in evidence (R. 712) this exhibit was nevertheless included in a large number which were introduced at the close of the trial (R. 1034).

For its second defense of this conduct, the Government suggests that the defendant used an earlier pre-trial statement of Raubunas dated July 27, 1939 (Exhibit 84, read to jury, R. 486-490, and introduced in evidence, R. 1034) to impeach the witness. It then asserts that "In these circumstances petitioners have little standing to complain if Raubunas' second statement (Ex. 92) did in fact reach the

jury" (Gov't Br. 93). However, the contention is contrary to established law. The general rule is that an ex parte pretrial statement corroborative of or consistent with testimony of a witness is not admissible in evidence to confirm his testimony. *Ellicott* v. *Pearl*, 10 Pet. 412, 438; *Vicksburg & Meridian Railr'd* v. *O'Brien*, 119 U. S. 99, 101-103; *Brady* v. *United States*, 39 F. (2d) 312, 315 (C. C. A. 8); *Dowdy* v. *United States*, 46 F. (2d) 417, 424 (C. C. A. 4) and authorities cited. The Government cites no cases to bring the introduction of this exhibit within the exception to this rule. And it cannot, for the exception recognizes only that, where the testimony of a witness is assailed as a fabrication of a recent date, proof that he gave a similar account of the transaction when no motive existed is admissible. *Malone* v. *United States*, 94 F. (2d) 281; *Boykin* v. *United States*, 11 F. (2d) 484, 486; *United States* v. *Potash*, 118 F. (2d) 54, 57 (C. C. A. 2); *Brady* v. *United States*, 39 F. (2d) 312, 315 (C. C. A. 8); *Dowdy* v. *United States*, 46 F. (2d) 417, 424. But here the Government witness was impeached by reference to his first statement given to Government agents on July 27, 1939. Clearly his later statement to the same agents on October 20, 1939, does not, as the Government contends, thereby become admissible. The exception requires that the corroborating statement must be one made when the motive did not exist, before the effect of such account could be foreseen, or where motives of interest would have induced a different statement. And it is obvious that this exception is well limited, for otherwise a designing witness might easily prepare the foundation for corroborating his testimony. *Dowdy* v. *United States*, 46 Fed. 417, 424 (C. C. A. 4). As was held in *Brady* v. *United States*, 39 F. (2d) 312, 315 (C. C. A. 8):

> If it be true, as claimed by the government, that the witness had made two affidavits, this would certainly not make the contents of the affidavit competent, even

> though it might have been proper to show that two affidavits had been made. The admission of this affidavit was violative of the most elementary rules of evidence. It amounted to permitting a witness to corroborate his testimony by producing an ex parte statement he had made out of court, which once admitted in evidence might well have weighed heavily with the jury to the prejudice of appellants. The admission of this exhibit we think reversible error, for which both cases must be reversed.

The third defense of the Government is that, in the cross-examination of Raubunas, "Stewart clearly conveyed to the jury the impression that the second one corresponded with Raubunas' testimony on direct examination * * *. Thus, even if exhibit 92, which is conceded is merely corroborative of Raubunas' testimony, did go to the jury it would hardly have prejudiced petitioners" (Gov't Br. 93). The flaw in this argument is that the portions of the cross-examination to which the Government cites (R. 490, 492-493, 513-514) provide not the slightest confirmation for the Government's statement.

The authorities cited above establish that admission of such a pre-trial statement is reversible error. The Government has failed utterly to sustain its burden of proving that the erroneous and unauthorized submission of this exhibit was not prejudicial to petitioner. *McCandless* v. *United States*, 298 U. S. 342, 347-348; *Ogden* v. *United States*, 112 Fed. 523, 527 (C. C. A. 3); *United States* v. *Dressler*, 112 F. (2d) 972, 978 (C. C. A. 7); *Todd* v. *United States*, 221 Fed. 205, 208 (C. C. A. 8). In substance, the Government now seeks to minimize the conduct of the prosecutor by assertion that his acts do not constitute reversible error, apparently attempting to reduce them to the class of mere technicalities. In *Miller* v. *Territory of Oklahoma*, 149 Fed. 331 (C. C. A. 8) the court said:

> The zeal, unrestrained by legal barriers, of some prosecuting attorneys, tempts them to an insistence upon the admission of incompetent evidence, or getting before the jury some extraneous fact supposed to be helpful in securing a verdict of guilty, where they have prestige enough to induce the trial court to give them latitude. When the error is exposed on appeal, it is met by the stereotyped argument that it is not apparent it in any wise influenced the minds of the jury. The reply the law makes to such suggestion is: that, after injecting it into the case to influence the jury, the prosecutor ought not to be heard to say, after he has secured a conviction, it was harmless. As the appellate court has not insight into the deliberation of the jury room, the presumption is to be indulged, in favor of the liberty of the citizen, that whatever the prosecutor, against the protest of the defendant, has laid before the jury, helped to make up the weight of the prosecution which resulted in the verdict of guilty.

This statement of the general rule has been quoted with approval and applied in *Coulston* v. *United States*, 51 F. (2d) 178, 182 (C. C. A. 10) and *Singer* v. *United States*, 58 F. (2d) 74, 77 (C. C. A. 3). And it is peculiarly applicable to the instant case, since it is everywhere recognized that where a case is as weak and doubtful as the Government admits this one to be, then the prejudice to the defendant is so highly probable that its non-existence cannot be assumed. *Berger* v. *United States*, 295 U. S. 78, 89.

Respectfully submitted,

HOMER CUMMINGS,
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November, 1941.